TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 345. 1441

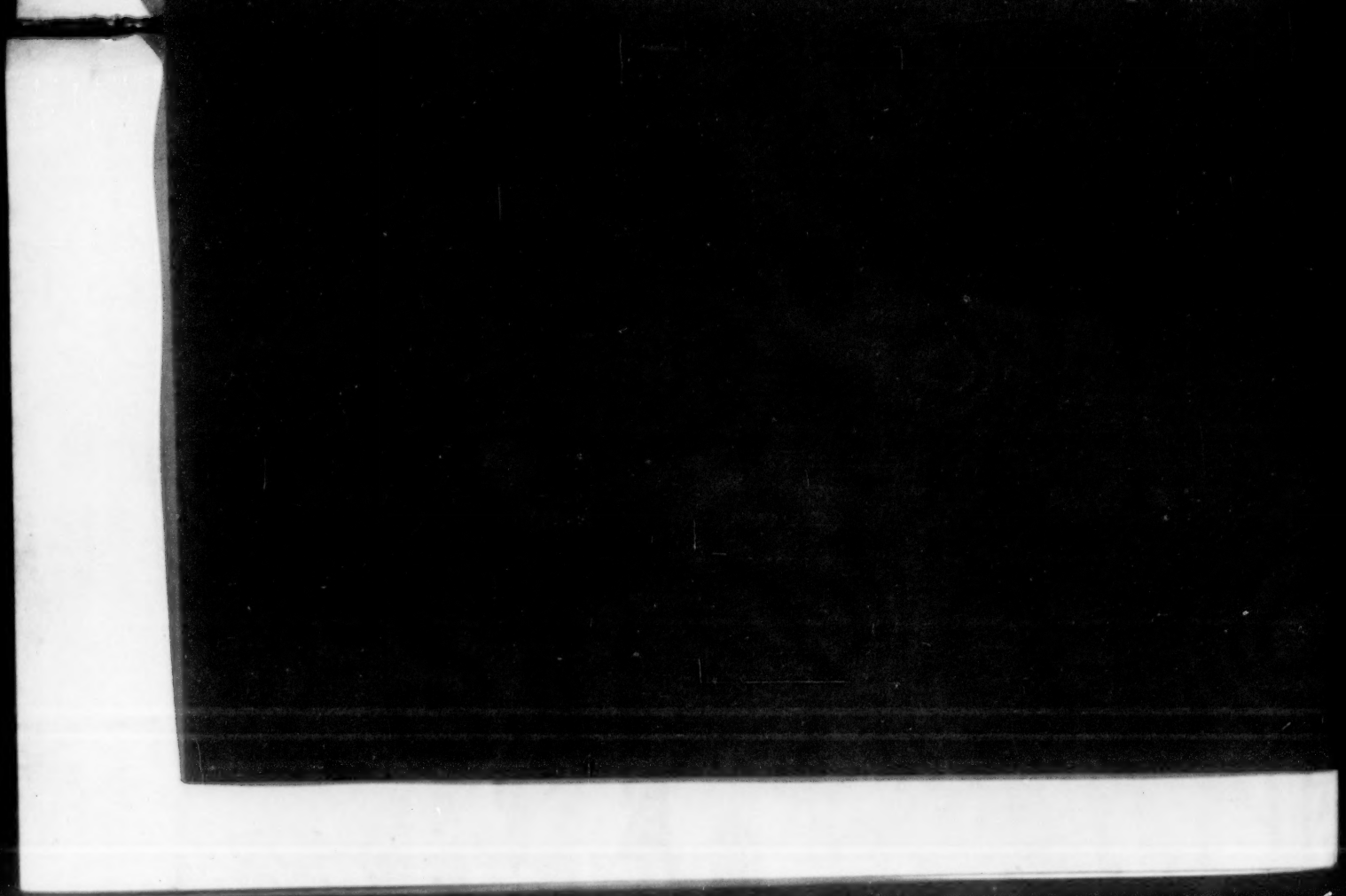
FREDERICK R. FOWLER, WILLIAM C. FOWLER, AND MAHLON B. CRAMPTON, PLAINTIFFS IN ERROR,

vs.

WILLIAM RATHBONE, WILLIAM RATHBONE, JUNIOR, S. G. RATHBONE, THOMAS K. TWIST, AND WILLIAM LIDDERDALE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 10, 1869.



SUPREME COURT OF THE UNITED STATES.

No. 345.

FREDERICK R. FOWLER, WILLIAM C. FOWLER, AND MAHLON B. CRAMPTON, PLAINTIFFS IN ERROR,

vs.

WILLIAM RATHBONE, WILLIAM RATHBONE, JUNIOR, S. G. RATHBONE, THOMAS K. TWIST, AND WILLIAM LIDDERDALE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate	2	1
Declaration	3	2
Issue joined	14	6
Bill of exceptions	15	6
Judgment	54	20
Exhibit A	57	21
Bond	135	45
Citation and service	139	46
Assignment of error	141	47
Joinder in error	144	47

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the second circuit and southern district of New York, greeting:

Because, in the record and proceedings, and also in the rendition of a judgment in a plea which was in the said circuit court before you, between William Rathbone, William Rathbone, jr., Samuel G. Rathbone, Thomas R. Twist, and William Lidderdale, plaintiffs, and Frederick R. Fowler, William C. Fowler, and Mahlon B. Crampton, defendants, manifest error, as it is said, hath intervened, to the great damage of the said defendants, as by their complaint appears, and it being fit that the errror, if any there hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according
1½ to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this twelvth day of April, in the year of our Lord one thousand eight hundred and sixty-nine, and of the independance of the United States the ninety-third.

[SEAL.] KENNETH G. WHITE, *Clerk.*

SCUDDER & CARTER, *Att'ys for Pl'ffs in Error.*

The foregoing writ is allowed this 13th day of April, 1869.

SAM'L BLATCHFORD,
District Judge.

(Indorsed:) U. S. circuit court, southern dist. of New York. Frederick R. Fowler et al., pl'ffs in error, vs. William Rathbone et al., def'ts in error. Writ of error. Scudder & Carter, att'ys for pl'ffs in error. Filed Ap'l 13, '69.

UNITED STATES OF AMERICA,
Southern Dist. of New York:

2 I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York in the second circuit, do hereby certify that the return to the foregoing writ of error is contained in the following pages, numbered from one to 140 inclusive, and contains a true and complete transcript of the record and proceedings had in said court in the case of Frederick R. Fowler et al., pl'ffs in error, vs. William Rathbone et al., def'ts in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the 2d circuit, this seventh day of December, in the year of our Lord one thousand eight hundred and sixty-nine, and of the independence of the said United States the ninety-fourth.

[SEAL.] KENNETH G. WHITE, *Clerk.*

[Five-cent internal revenue stamp affixed and canceled.]

3 United States circuit court for the southern district of New York, second circuit.

Pleas before the circuit court of the United States for the southern district of New York, in the second circuit, at the city of New York, of October term, in the year one thousand eight hundred and sixty-seven.

Witness Hon. Samuel Nelson, justice.

KENNETH G. WHITE, *Clerk.*

Be it remembered that heretofore, and on the twenty-seventh day of November, of October term, in the year one thousand eight hundred and sixty-seven, before the circuit court of the United States for the southern district of New York, at the city of New York, came William Rathbone, William Rathbone, junior, Samuel G. Rathbone, Thomas K. Twist, and William Lidderdale, by Owen, Nash & Gray, their attorneys, and brought into the said court before the aforesaid justice thereof their certain declaration against Frederick R. Fowler, William C. Fowler, and Mahlon B. Crampton in the words following, that is to say:

SOUTHERN DISTRICT OF NEW YORK, *ss:*

4 Frederick R. Fowler, William C. Fowler, and Mahlon B. Crampton were summoned to answer William Rathbone, William Rathbone, jr., Samuel G. Rathbone, Thomas K. Twist, and William Lidderdale of a plea of trespass on the case upon promises.

And thereupon William Rathbone, William Rathbone, jr., Samuel G. Rathbone, Thomas K. Twist, and William Lidderdale, (the plaintiffs herein,) by Owen, Nash & Gray, their attorneys, complain of Frederick R. Fowler, William C. Fowler, and Mahlon B. Crampton, defendants, being now by due appearance here in court:

For that whereas the plaintiffs, before and at the several times hereinafter mentioned, were and still are aliens, being subjects of the Queen of Great Britain and Ireland, and the defendants were at the said several times and still are citizens of the State of New York; and also for that whereas the said defendants, before and at the times hereinafter mentioned, were copartners in trade and business, carrying on their said business in the city of New York under the name and style of F. R. & W. C. Fowler & Crampton.

And also for that whereas the said plaintiffs, before and at the several times hereinafter mentioned, were the owners of a certain ship or vessel called the "Oneiza," her tackle, apparel, and furniture, of great value, to wit, of the value of forty thousand dollars, and as such

5 owners they were and are lawfully entitled to have, collect, recover, and receive the freight and earnings of the said ship, and also the claim for general average and other expenses hereafter mentioned, to wit, at the southern district of New York aforesaid; and also for that whereas the said ship heretofore, to wit, on the seventh day of August, in the year one thousand eight hundred and sixty-six, set sail from Calcutta, bound on a voyage to New York, and being then and there laden with divers goods and merchandize belonging to the said defendants, of great value, to wit, of the value of sixty thousand dollars, to be carried and conveyed therein from thence to New York aforesaid, and there to be delivered to the defendants or to their assigns on payment of freight; and that afterwards, and whilst the said ship was proceeding on her said voyage with the said goods and merchandize on board thereof, to wit, on the twenty-second day of January, in the

year one thousand eight hundred and sixty-seven, at the southern district of New York, she became and was, by and through the perils and dangers of the seas, and the force and violence of the winds and waves, and of large bodies of floating ice which she encountered, greatly broken, cut, opened, strained, and damaged in her bows, insomuch that divers large quantities of water then and there entered the said
6 ship, whereby she became and was in great and imminent danger of sinking in deep water; and thereupon, for the preservation and safety of the said ship, and of the said goods and merchandize so on board thereof as aforesaid, it became and was necessary, and the master then and there decided and determined, to run the said vessel into shoal water, and thereby strand her, and that in pursuance thereof he did then and there, to wit, on the day and year, and at the place aforesaid, voluntarily run the said ship or vessel, with the defendants' cargo on board thereof as aforesaid, into shoal water, and thereby strand her upon certain flats in the lower bay, to wit, in the southern district aforesaid, whereby, and by means of the said several premises above stated, the said ship, her tackle, &c., then and there became and were greatly broken and injured, whilst the aforesaid goods and merchandize of the said defendants were saved; of all which the said defendants afterwards, to wit, on the day and year and at the place aforesaid, had notice.

And the plaintiffs aver that by reason of the premises the said defendants then and there became and were liable to contribute and to pay to the plaintiffs towards the loss, damage, and injury so occasioned to the said ship, her tackle, &c., as aforesaid, a certain sum of money, by way of general average.

7 And the plaintiffs further say that being so liable, and in order to obtain a delivery of their said goods and merchandize, the defendants afterwards, to wit, in the southern district aforesaid, in and by their said copartnership name, made and executed a certain agreement or instrument in writing whereby, after reciting therein in substance and effect the facts and circumstances hereinbefore stated, they, the said defendants, did severally and respectively (but not jointly with others) promise and agree that the aforesaid loss and damage to the said ship, her tackle, &c., and other incidental expenses thereon which should appear to be due from them, either as owners, shippers, or consigners of said cargo, should be paid by them according to their parts or shares in the said cargo, which should belong or be consigned to them, or should belong or be consigned to any person or persons with whom they were copartners, agents, or attorneys, or in any manner concerned therein. And it was in and by the said agreement or instrument in writing further provided that the losses, damages, and expenses thereinbefore mentioned should be stated and apportioned by Henry W. Johnson and A. Foster Higgins, average adjusters, in accordance with the established usage and laws of the State of New York in similar cases. And the said defendants did, in and by said agreement and instrument in writing, further agree to furnish, on the request of the said adjusters, all such information and docu-
8 ments as they might require from the said adjustment, as by the said agreement or instrument in writing will, on reference thereto, amongst other things, more fully and at large appear.

And the plaintiffs aver that afterwards, and before the commencement of this action, to wit, on the day and year aforesaid, at the city of New York, in the southern district aforesaid, an adjustment of the loss and damages hereinbefore stated, and of the incidental expenses thereon, as provided in and by the aforesaid agreement or instrument in

writing, was duly stated and apportioned by the aforesaid Henry W. Johnson and A. Foster Higgins, in accordance with the established usage and laws of the State of New York in similar cases, in and by which it appeared, and such the plaintiffs aver to be the fact, that the defendants were bound to contribute and pay to the said plaintiffs, by way of general average towards the loss, damages, and injury so occasioned to the said ship, her tackle, &c., as aforesaid, a large sum of money, to wit, the sum of twelve thousand two hundred and ninety-nine dollars and ninety cents, whereof the defendants afterwards, to wit, on the day and year aforesaid, and at the place aforesaid, had notice.

2d count. And also for that whereas the said plaintiffs, before and at the time of happening of the damages and losses in this count
9 mentioned, were owners or proprietors of a certain other ship or vessel, called the "Onezia," and of her tackle, anchors, masts, boats, and appurtenances, the same being of great value, to wit, of the value of forty-thousand dollars, and which said vessel was then proceeding on a certain voyage, to wit, from Calcutta, in the province of India, towards New York, in the United States of America, with certain goods and merchandizes of the said defendants, of great value, to wit, of the value of sixty thousand dollars on board thereof, to be carried and conveyed therein on freight during the said voyage, to wit, at New York, in the southern district aforesaid.

And whereas also, whilst the said ship or vessel was sailing and proceeding on her said voyage with the said goods and merchandize on board thereof, to wit, on the 22d day of January, 1867, at the southern district of New York aforesaid, she became and was, by and through the perils and dangers of the seas, and the force and violence of the winds and waves, and of large bodies of floating ice which she encountered, greatly broken, cut, opened, strained, and damaged in her bows, insomuch that divers large quantities of water then and there entered the said ship, whereby she became and was in great and imminent danger of sinking in deep water; and thereupon, for the preservation and safety of the said ship or vessel, and of the said goods and merchandize so on board thereof as aforesaid, it became and
10 was necessary, and the master then and there determined, to run the said ship or vessel into shoal water and thereby strand her; and that, in pursuance thereof, he did then and there, to wit, on the day and year and at the place aforesaid, voluntarily run the said ship or vessel, with the defendants' cargo on board thereof, as aforesaid, into shoal water, and thereby strand her upon certain flats in the lower bay, to wit, in the southern district aforesaid; and by means of the said several premises above stated, the said ship, her tackle, &c., then and there became and were greatly broken and injured; and afterwards, to wit, on the day and year aforesaid, at the southern district aforesaid, it became and was necessary, in order to repair said ship or vessel, to raise her by pumping the water out of her, and to tow her to a dock, and thereupon the said damage done to said ship or vessel was repaired, and the necessary expenses incurred by the said plaintiffs in the premises then and there amounted to a large sum of money, to wit, the sum of thirty thousand dollars; and the said goods and merchandizes of the defendants were then and there saved and preserved, and arrived safely into the hands and possession of the said defendants; of all which said several premises the said defendants afterwards, to
11 wit, on the day and year aforesaid, at the southern district aforesaid, had notice; and by reason of the premises and of the said

defendants so being such owners of the said goods and merchandizes, so on board the said ship or vessel as freight, as aforesaid, and so saved and preserved by the means aforesaid, they, the said defendants, as such owners, became and were liable to contribute to the said losses, damages, and expenses in a general average; and thereupon, in consideration of the premises, the said defendants afterwards, to wit, on the day and year last aforesaid, at the southern district aforesaid, undertook, and then and there faithfully promised the said plaintiffs, to pay them so much money, as they, the said defendants, as owners of the said goods and merchandizes, were liable to contribute to the said losses, damages, and expenses in a general average, when they, the said defendants, should be thereunto requested.

And the said plaintiffs aver that the said defendants, as such owners of the said goods and merchandizes as aforesaid, were liable to pay and contribute to the said losses, damages, and expenses in a general average a large sum of money, to wit, the sum of twenty thousand dollars, whereof the said defendant afterwards, to wit, on the day and year last aforesaid, at the southern district aforesaid, there had notice.

3d count. And whereas also the said defendants afterwards, to wit, on the day and year last aforesaid, at the southern district of New York, were indebted to the said plaintiffs in the further sum of
12 twenty thousand dollars, for certain general average, before that time and then and there due and payable from the said defendants, upon, for, and in respect of divers goods, merchandizes, and chattels of the said defendants, having been before that time carried and conveyed by the said plaintiff in and on board divers other ships or vessels in and during divers voyages for the said defendants, and at their special instance and request, and in respect of certain losses, damages, and expenses by the said plaintiffs incurred in and about the preservation of the said ship and cargo, and the said last-mentioned goods, merchandizes, and chattels from damage and loss during the said last-mentioned voyages; and, being so indebted, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the southern district aforesaid, undertook and then and there faithfully promised the said plaintiffs to pay them the said last-mentioned sum of money when they, the said defendants, should be thereunto afterwards requested.

And whereas also afterwards, to wit, on the day and year last aforesaid, at the southern district of New York aforesaid, in consideration that the plaintiffs, at the like special instance and request of the said defendants, had before that time carried and conveyed divers other goods, merchandize, and chattels of the said defendants, in and on board
13 divers other ships or vessels during certain other voyages, and the said defendants undertook and then and there faithfully had incurred certain other losses, damages, and expenses in and about the preservation of the said last-mentioned ship and cargo, goods and merchandize, and chattels during the last-mentioned voyages, they, the said defendants, undertook and then and there faithfully promised the said plaintiffs to pay them so much money as they therefor reasonably deserved to have of the said defendants when they, the said defendants, should be thereunto afterwards requested. And the said plaintiffs aver that they therefor reasonably deserved to have of the said defendants the further sum of twenty thousand dollars, to wit, at the southern district of New York aforesaid, whereof the said defendants afterwards, to wit, on the day and year last aforesaid, there had notice.

And whereas also the said defendants afterwards, to wit, on the day

and year last aforesaid, was indebted to the said plaintiffs in the further sum of twenty thousand dollars for so much money by the said plaintiffs before that time paid, laid out, and expended to, and for the use of, the said defendants, at their like special instance and request; and, being so indebted, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the southern district aforesaid, undertook and then and there faithfully promised the said plaintiffs to pay to them the said last-mentioned sum of money when they, the said defendants, should be thereunto afterwards requested.

14 And whereas also the said defendants afterwards, to wit, on the day and year last aforesaid, at the southern district of New York aforesaid, accounted with the said plaintiffs of and concerning divers other sums of money from the said defendants to the said plaintiffs before that time due and owing and then in arrears and unpaid, and upon such accounting the said defendants were then and there found to be in arrear and indebted to the said plaintiffs in the further sum of twenty thousand dollars, and being so found in arrear and indebted, they, the said defendants, undertook and then and there faithfully promised the said plaintiffs to pay them the said last-mentioned sum of money when they, the said defendants, should be thereunto afterwards requested.

Nevertheless, the said defendants have not paid the said several sums of money above mentioned, or any part thereof, to the said plaintiffs, although often requested so to do, but to pay the same, or any part thereof, to the said plaintiffs the said defendants have hitherto wholly refused, and still do refuse, to the damage of the plaintiffs of twenty thousand dollars; and therefore the said plaintiffs bring suit, &c.

And the said Frederick R. Fowler, William C. Fowler, and Mahlon B. Crampton come and defend the wrong and injury, when, &c., and say that they did not undertake or promise in manner and form as

15 the said plaintiffs have above thereof complained against them; and of this they put themselves upon the country; and the said plaintiffs do the like.

Therefore the issue above joined is ordered by the circuit court to be tried at a stated term of the said circuit court appointed to be held at the United States court-rooms in the city of New York, within and for the southern district of New York, [within and for the southern district of New York,] on the first Monday of April, 1868.

And now at this day, to wit, the fifth day of April in the year 1869, to which day the said cause was duly continued, at the court-house in the city of New York, in the southern district aforesaid, come the parties aforesaid by their attorneys aforesaid. And hereupon the said defendants now here bring into court a certain bill of exceptions, taken and sealed on the trial of the issue aforesaid, and the same is, on the prayer of the said defendants, entered upon the record of the proceedings in this cause, and is enrolled in the words and figures following, to wit:

16

17 U. S. circuit court.

FREDERICK R. FOWLER AND OTHERS *ads.* WILLIAM RATHBONE AND OTHERS.

Afterwards, to wit, at a circuit court of the United States held at the

court-house in the city of New York, in and for the southern district of New York, before Samuel Blatchford, esqr., judge of the district court of the United States for the southern district aforesaid, appointed to hold the said circuit court, on the fourth day of June, in the year 1868, the aforesaid issue so joined between the parties as aforesaid came on to be tried by a jury of the district aforesaid, for that purpose duly empannelled; at which day came there as well the said plaintiffs as the said defendants, by their respective attorneys aforesaid; and the jurors of the jury aforesaid, for that purpose duly empanelled to try the said issue, being called, also came, and were then and there in due manner chosen and sworn to try the said issue.

And upon the trial of the said issue the counsel for the plaint-
18 iffs, to maintain and prove the issue on his part, produced a paper writing, signed by the defendants, commonly called an average bond, dated 23d January, 1867, which was read in evidence, and which is in the words and figures following, to wit:

"*Average bond.*

"Whereas the ship 'Oneiza,' whereof master, having on board a cargo of merchandize, sailed from the port of Calcutta, during the month of August last, bound for New York, and in the due prosecution of her said voyage arrived off Sandy Hook on the 16th January last, and the same night anchored inside the Hook, being unable to proceed to New York in consequence of ice and a heavy gale. On the 21st the ship was taken in tow, and brought as far as the quarantine grounds, when, by direction of the pilot, she anchored, the weather being too thick to proceed, and channel being full of ice, floating with the tide. The pumps were sounded every hour, and no more water than usual was found untial 7 a. m., when the ship was observed to be settling by the head, and it was then discovered that she had been cut through by the ice, and had 6 feet of water in her. The leak being so great that the ship could not be freed by her own pumps, nor by any other means within reach, and the danger of her sinking where she was being
19 imminent, the captain determined, for the preservation of the vessel and cargo, to run the ship ashore; and, the tugs being still alongside, she was immediately, by their assistance, put on the Staten Island flats, by which time she had ten feet of water in her. Steam-tugs were employed, and the assistance of the Coast Wrecking Co. was procured, who sent lighters, steam-pumps, &c., and the cargo is now being discharged, and efforts made to save both vessel and cargo, by which means certain losses and expenses have been incurred, and other expenses hereafter may be incurred in consequence thereof, which (according to the usage of this port) may constitute a general average, to be apportioned on the said vessel. Her earnings, as freight and the cargo on board said vessel, and other charges thus incurred, may apply to and be due from specific interests.

"Now we, the subscribers, owners, shippers, consignees, agents, or attorneys of certain consignees of said vessel or cargo, do hereby, for ourselves, our executors, and administrators, severally and respectively, but not jointly, or one for the other, covenant and agree to and with Joseph R. Busk that the loss and damage aforesaid, and other incidental expenses thereon as shall be made to appear to be due from us, the subscribers to these presents, either as owners, shippers, consignees,
20 agents, or attorneys of certain consignees of said vessel or cargo, shall be paid by us respectively, according to our parts or shares

in the said vessel, her earnings as freight, and her said cargo, as shall belong or be consigned to us, or shall belong or be consigned to any person or persons with whom we are copartners, agents, or attorneys, or in any manner concerned therein, provided such losses and expenses aforementioned be stated and apportioned by Henry W. Johnson and A. Foster Higgins, average adjusters, in accordance with the established usage and laws of this State in similar cases. And we do further bind ourselves to furnish promptly, on request of said adjusters, all such information and documents as they may require from us to make said adjustment; and, for the true performance of all and singular in the premises, we do severally hereby bind ourselves, our respective heirs, executors, and administrators, to the said Joseph R. Busk in the penal sum of twenty thousand dollars, lawful money of the United States.

"In witness whereof we have to these presents set our hands, in the city of New York, this twenty-third day of January, in the year of our Lord one thousand eight hundred and sixty-seven.

21 "Consignees.	No. of packages and description.	Amount of invoice.	Where insured
"J. R. Busk	45 bales gunney cloth		Europe.
"E. D. Morgan & Co	195 " gunny bags	Rupees, 8,564	Do.
"Mumzinger Pitzipio	2,000 bags linseed	Rupees, 19,923 15	Sun Mutual.
"H. W. Hubbell	244 bales jute	Rupees, 5,849 12 9	Atlantic.
"J. L. Phipps & Co	200 bales gunny bags	Rupees, 8,359 10 3	England.
"J. L. Phipps & Co	216 bales gunny bags	Rupees, 9,985 1 0	England.
"F. R. & W. C. Fowler & Crampton	2,280 bags saltpetre	R's, 35,579 14 0	Atlantic.
Do do	282 bales gunny cloth	R's, 17,277 11 0	"
Do do	9,994 bags linseed	R's, 133,657 60	"
"Weston & Gray	210 bales gunny cloth	R's, 13,478 33	Pacific & M. Ins. Co., Calcutta.
"Hastings & Weed	100 rolls con matting	3,376 13 0	Sun Mutual."

The plaintiffs, further to maintain the said issues on their part, called Thomas E. Ievons, who testified as follows:

"I know Joseph R. Busk, the person named in this average bond. He is now in England. I am connected with him in business. He was the agent of the owners of the 'Oneiza,' the plaintiffs in this action, and transacted the business of the ship."

(His honor the judge received the above-mentioned bond as prima facie evidence only of the recitals contained in it relating to the disaster.)

The plaintiffs, further to maintain the said issues on their part, called Andrew Foster Higgins, who testified as follows:

22 "I am an average adjuster in the city of New York. I am one of the firm of Johnson & Higgins named in the average bond. I have been 22 years in the business of adjusting losses, and have adjusted many thousand cases."

On being shown a paper, the witness says:

"This is the average adjustment in the case of the ship 'Oneiza,' which was made by my firm of Johnson & Higgins."

(The said statement was thereupon read in evidence, and was as follows:

And is appended hereto and marked "Exhibit A.")

The witness further testified as follows:

"The total amount found due from the defendants' cargo was $12,299 90, against which we gave them credit for damage: On linseed,

$700, and on gunny cloth, $219 12, occasioned by handling the cargo, on a forced discharge, making a total credit of $919 12, which, being deducted, left a balance of $11,380 78 due from the defendants. This adjustment was made up according to the usage and customs of this port."

Cross-examined:

"The amount which has been contributed for damage to the ship is $12,441 93, of which the cargo pays in proportion as 74,000 bears to 126,000 of the whole value of the cargo. The defendants were consignees, or represented about $50,000. The difference between
23 74,000 and 126,000 is made up by the value of the vessel and freight. We estimated the freight at one-half of its gross amount, as is customary. The gross freight was $28,918 in currency. I presume the freight was all collected. The damage to the defendants' cargo by the disaster was, as I understand, over $100,000. In this adjustment we have not made the ship and freight contribute anything towards the damage done to the cargo by water, or by the results of water. We have adjusted it on the principle that the ship and freights were not liable to contribute for that damage. We have made the cargo contribute to the damage done to the ship by stranding. We arrived at the damage so done to the ship by examining the bills with Capt'n Story, who acted as superintendent on the part of the underwriters. The accident was in the lower bay, about 15 miles from New York. The stranding was on the lower end of Staten Island."

Re-direct:

"We did not allow for damage to cargo, on the principle that no damage was allowable unless it proceeded from a general average loss, and we thought this loss was not of that kind. All the other consignees and owners of the cargo have settled according to this adjustment, except the defendants."

The plaintiffs, further to maintain the said issues on their part, called Israel I. Merritt, who testified as follows:

24 "I am a wrecker. I was connected with the Coast Wrecking Company in January, 1867, as general agent and superintendent. I have been engaged in the wrecking business between 23 and 24 years. I was concerned in saving the ship 'Oneiza.' I received a dispatch that the ship was sunk on Staten Island flats; that she had been stranded; and I went down to her. I started with a steamboat and divers, and reached the ship about noon. I found the water inside of her about the same as it was outside. The tide was falling; it was about an hour's ebb. I immediately directed the diver to be put down, to ascertain where the damage was, and the pumps to be put aboard. The diver reported that on the port side of the ship was cut pretty bad; her port, on the port side, stove in; and that there was a small hole on the starboard side. I stopped the hole, and started the pump, and pumped her out. I got her pumped out by about 8 or 9 in the evening; and after that I kept her free and clear. The depth of water where she lay was, at half tide, 22 feet at the bow and 26 feet at her stern. The depth of water did not embarrass me in putting the pumps on deck and working them. I was told the ship drew from 20 to 21 feet before she took to leaking. When she was brought to New York she drew
25 26 feet aft. I superintended breaking out the cargo; I helped break it out. The linseed was in bags, in all parts of the ship.

What was taken out was put into lighters. I can't say positively how many days we were at work. The ship was brought to New York after we had taken out about half of her cargo. The day I first went down was fine and beautiful. There was considerable ice running. I didn't examine to see whether there were any other leaks; the holes in her bows were large enough to take in water freely. At the place where she had been lying before she was stranded the water was between six and seven fathoms in depth, and if she had sunk there her decks would have been submerged. I did not look for any other water than that which came in from the holes. After I first pumped her out I didn't allow any water to reach the cargo. I commenced pumping about 3 or 4 o'clock p. m. of the same day she was stranded. The bottom was soft where she lay. I didn't notice that she strained any before we pumped the water out."

Cross-examined:

"I found her hard aground. The water was within two feet of her upper deck; part of the cargo from 18 to 20 inches from the main hatch forward, about five feet, was dry. This cargo was hemp, linseed,
26 and, they said, indigo, but I never got into it. If the ship had been sunk where she was anchored at first, we could have raised her; saving the property at either place would have been a question of difference in expense."

Question:

"What would have been the difference?"

(Objected to.)

Answer:

"My bill in this case was twelve thousand and odd dollars, and it would have cost thirty thousand dollars to raise her, if she had sunk at her anchoring place. I never examined the ship's bottom; I didn't observe any straining of the ship; I took no notice. I had the bottom sounded and knew it to be soft. Where she lay at anchor the bottom was about the same as where I found her, being soft and, under that, hard sand. Where I first found her was just a cable's length from the dock, and about six miles from New York, this side of the Narrows. The place where she lay at anchor was some 300 yards from where I found her. I had sent my boat down before this to where she lay in the lower bay. The hole on the port side was broke in from six to seven inches and about two feet long; this was at about her loaded line. The other holes on the port side were smaller. The planks were dragged out in some places so that you could get your hand through. After
27 I got her freed from water, I started the pumps once in an hour; not so often the next day. There were some similar small holes on the starboard side. If the ship at anchor had had material handy, the holes might have been stopped by canvass. I cannot say that the ship's pumps could have kept her free. The ship's pumps don't heave much water; at first our pumps hove some 40 barrels a minute."

Re-direct:

"Next day I didn't have the pump started so often, because the holes had been stopped up. The cargo was swollen considerably, so that we had to cut some of the bags open. The holes in the bows were almost level with the water."

The plaintiffs, further to maintain the said issues on their part, called Jacob A. Westervelt, who testified as follows:

"I am a ship-builder, and have been such for forty five or six years. I repaired the ship 'Oneiza;' she was taken out on dry-dock; I was on the survey with Captain Story and Mr. Mackie; surveyed her twice before she was hauled out, then again when she was out of the water and on the dry-dock. We found her bow port broken in, and badly chafed and cut; some of the planks were cut nearly through. The cargo of linseed was very much swollen, and it had strained the ship considerably. We discovered no leakage, but we found the
28 fastenings about the keel and keelson. The deck was started up, and the seams and straps broken up. This was caused by the swelling of the cargo, and by lying on an uneven bottom, together, I suppose. We did all the repairs on the ship, including joiners', carpenters', and blacksmiths' work; Captain Story did the apportioning our bill into general and particular average charges. I presume the straining was from lying on uneven bottom."

Cross-examined:

"I signed a written survey; I don't know where it is."

The plaintiffs, further to maintain the said issues on their part, called William W. Story, who testified as follows:

"I am a marine surveyor for the Board of Underwriters, and have been such for ten years past. My general duty is to look around and see if vessels are fit to go to sea, and, if damaged, to examine them. I was on the 'Oneiza' at Brooklyn, after she had been brought up. The cargo was not then all [all] out. It was nearly all discharged from between decks. The deck planks, beams, and straps over beams were very much strained; some of them broken. I saw men at work getting out the cargo. They had to cut some of the bags, they were so much
29 swelled. In the lower hold was linseed and gunny bags. We found canvass over the port, and plank over that, and after this was removed we found the lowest corner of the port had been cut by the ice. It had cut through the first plank. The hole through into the ship was six inches square probably. The sheathing was cut in both bows, but not through. The hole was under the water when loaded. I surveyed her several times, and, after she was hauled out, I was asked how to distribute the charges for repairs. Mr. Mackie and I examined Mr. Westervelt's bill as it was copied in the draft average statement, and we allowed certain items which I marked to be general average, according to the work. We did this in presence of the adjusters; we used our best judgment about it. I saw that the items we allowed as general average were copied into the average statement produced here in court. I think the apportionment was correct."

Cross-examined:

"We could not tell absolutely what damage was caused by lying on the bottom, and what from swelling of cargo, but we decided it as well as we could. The damage by the swelling of the cargo was not put in general average; but that caused by straining, while lying on the uneven bottom, was put in. I think I signed two surveys and gave them to Mr. Higgins."

Re-direct:

"This is one of them."

30 The survey was thereupon read in evidence, and is in the words and figures following:

"NEW YORK, *March 4th*, 1867.

"At the request of Mr. J. R. Busk, of this city, the undersigned have held three surveys or examinations, on the 8th and 28th of February and 1st of March inst., on board of the British ship 'Oneiza' of Liverpool, now lying in this harbor, and recently cut through and sunk by the ice at Staten Island near this city, and report as follows:

"That they found the beams of the upper and lower deck, particularly in the centre of the ship, between the fore and mizen masts, strained or forced upwards from two to four inches from the pressure of the swollen flaxseed, and causing so great a strain upon the iron straps securing the stanchions to the beams as to break them, and straining the fastenings of the knees, and to some extent the fastenings of the decks and waterways of lower deck; some of the kelson bolts started and strained; some of the knees of the stanchions in hold broken, and fastenings loosened or strained; on the outside of the ship, forward, several of the plank are badly cut by the ice; the port on the larboard bow broken in; a considerable portion of the sheathing around
31 the bow torn off by the action of the ice; and the midship portion damaged, and some of it torn off at the water's edge. We recommend that the ship be taken out of water, and the metal sheathing, wooden sheathing, and injured plank removed, and replaced with new; the entire ship recaulked, kelsons refastened, stanchions and straps repaired, fastenings of deck knees, where started, to be renewed; additional fastenings put in ceiling and clamps between decks where necessary; a stringer to be put in the lower-deck waterways, and under the upper deck beams, fastened in a substantial manner; the ceiling between decks thoroughly wedged with yellow-pine wedges, and the lower deck plank, where started up, to be got down to the beams and refastened.

"ROBERT MACKIE,
"*Lloyd's Agent.*
"JACOB A. WESTERVELT,
"*Master Shipwright.*
"W. W. STORY,
"*Surveyor for Board of Underwriters, N. Y.*

"Upon a further examination of the ship 'Oneiza' and damage done to her by the straining to which she has been subjected, we further recommend that she be diagonally braced or trussed with yellow-pine materials of suitable size between the rider on lower-deck waterway and stringer under the upper deck beams, which are called for in the previous surveys.

"New York, March 18, 1867."

32 The plaintiffs, further to maintain the issue on their part, called Robert Mackie, who testified as follows:

"I am a shipping merchant and agent for Lloyd's, (English & Irish,) and have been such for 19 years past in New York. I have had a great deal of experience in examining vessels and cargoes which have been damaged. I was on board of the 'Oneiza' a few hours after she was stranded. They were then getting the steam-pumps on board. I went to see her as agent of the underwriters. she lay on the ground slightly listed to port; the water had been in her nearly up to the hatches, but it had fallen as the tide ebbed; the tide ebbed and flowed in her. I next saw her in Brooklyn, in company with Captain Story and Mr. Westervelt; we then found the vessel very much strained, her port stove in,

and sheathing very much cut on side below water line along the deck waterways; she seemed to be strained between decks and out of position; I supposed the straining was from lying on an uneven bottom. I was with Captain Story in going over the bills of Mr. Westervelt; we agreed on general principle of apportioning the repairs; the statement was carried out on that principle. The linseed was stowed in the
33 bottom of the vessel. I have had great experience with linseed. The first effect of salt water is to swell it and discharge a portion of its glutinous qualities; the longer it remains wet, the more it deteriorates. There was delay in selling this cargo, by reason of the difficulties with the Atlantic Insurance Company; there was a delay of a week or fortnight about the cargo of linseed; there was a damage by this, I should think, of twenty-five per cent."

Cross-examined:

"None of the officers of the Atlantic Insurance Company consulted with me. I know the cargo wasn't sold within that time, from seeing it on the dock. It was not difficult to distinguish the damage to the ship by straining from that of swelling of cargo. I have superintended building of vessels."

Re-direct:

"I saw no places indicating leakage, except the holes in the bow."

Re-cross:

"I made a survey at the request of all the owners insured abroad. I don't know of any difficulty with the Atlantic Insurance Company, of my own knowledge."

Mr. Westervelt, recalled and examined by the defendants, says:

"The 'Oneiza' was recaulked in a considerable measure; I didn't find any oakum out."

The plaintiffs here rested their case.

And thereupon the defendants' counsel, to maintain the issue
34 on their part, called Frederick R. Fowler, who, being duly sworn, testified as follows:

"I am one of the defendants; they are importers and crushers of seed for linseed oil. We had cargo by the 'Oneiza.' The value of the cargo, if it had been sound, was as follows:

"Linseed, 9,994 bags, (currency)	$137,327 26
"Saltpetre, 2,280	35,442 96
"Gunny cloth, 282 bales	23,641 70
"Making in all	196,411 92

"This same cargo was sold at auction. Its gross value I cannot tell, but its net proceeds to us were—

"For linseed	$44,077 41
"Saltpetre	2,131 74
"Bags	3,877 73
"Making	$50,086 88

"And which was the sum taken by the adjusters; our loss was over $100,000 on the cargo.

"I attended on the discharge of the vessel. There was saltpetre in the bottom. The linseed was all the way through, but principally in the lower hold. The gunny cloth was mostly between decks. I think we got some of the gunny cloth dry, but none of the seed. The cargo was long in discharging. It was three weeks from the time she came up
35 from quarantine before it was sold. I don't think there was any delay in the sale. We had some preliminary negotiations with the underwriters, but the delay in the sale was not caused by this. The saltpetre was sold at private sale by consent of the underwriters. I don't remember any delay in getting the cargo through the custom-house. The saltpetre was sold as soon as it could have been. The gunny cloth was in a warehouse some time. My impression is, that this was not damaged by delay. The linseed was not only wet, but some of it was rotten. It was sold as soon as it reasonably could be. We paid the freight on what was landed."

Cross-examined:

"The prices I have given are without duty and freight being paid. The duty on linseed was 16 cents a bushel of 52 pounds, in gold. My estimate of value was made up at $3 58 per bushel, in currency. There are about 3¼ bushels in a bag. I can't say what the linseed sold for per bag or bushel; I can only state what we received as its proceeds. This cargo was insured in the Atlantic Insurance Company. I can't swear that we were notified to take away the cargo. I didn't remove any till after the sale, and none of it was sold until it was all out. I don't recollect requesting it not to be sent to a storehouse. My brother
36 had more to do with it than I. The Atlantic Insurance Company neither accepted or rejected the abandonment. I don't recollect that the company's appraisers notified us to sell. I had a great deal of negotiation with the insurance company about the loss. They have paid us a constructive total loss."

Captain Story, being recalled by defendants, testified as follows:

"The floor timbers are about 16 inches deep; then comes the ceiling, not less than 4 inches thick; then the dunnage, 12 inches thick. There would be two or two and a half feet between the bottom of the vessel and the cargo. There would always be twelve inches of water which the pumps would not throw out or reach."

The defendants' counsel thereupon read in evidence the protest of the master, dated March 6th, 1867, and which is in the words and figures following:

"STATE OF NEW YORK, *City of New York*, ss:

"By this public instrument of declaration and protest be it made known and manifest to all whom it may concern that, on the twenty-second day of January, in the year of our Lord one thousand eight hundred and sixty-seven, before the British consul at New York, per-
37 sonally appeared William H. Spurr, master of the ship 'Oneiza' of Liverpool, Eng'd, of the burthen of about 1,317 tons, and noted with him in due form of law his protest for the uses and purposes hereinafter mentioned. And now on this day, to wit, on the sixth day of March, in the year A. D. 1867, before me, A. Foster Higgins, a public notary in and for the county of New York, in the State of New York, duly and by lawful authority admitted, commissioned, and sworn, and residing

and practising in the city of New York and State aforesaid, comes the said William H. Spurr, and requires me to extend his said protest; and together with him come and appear John Galgey, John McGovern, James Davidson, Jno. Seddon, and William McGee, all belonging to the aforesaid ship, all of whom, being by me severally, duly, and solemnly sworn on the Holy Evangelists of Almighty God, voluntarily and freely depose and say that the said ship, laden with a general cargo, being in every respect seaworthy, and in all things fitted and provided for her intended voyage, sailed on the 4th Aug't, '66, from Calcutta, bound to New York; Aug't 4th, at 3 a. m., hove up anchor and proceeded down the river in tow of a tug; 6th, at anchor in the river, a northerly breeze, which increased to a gale with rain and hard squalls; 7th, gale
38 continuing; 8th, more moderate, hove up anchor and towed until Sanger light-house bore east; the gale again came on with renewed violence; let go port anchor, but while veering away chain it parted in the hawse pipe, loosing the anchor and 55 f'ms chain; got under way and proceeded on the voyage; from this date experienced heavy gales and seas, but nothing worthy of note occurred until Aug't 13th, which day begun with squally and unsettled weather, with rain and heavy sea from the southward; ship rolling and pitching fearfully; in a heavy squall split the inner jib; from this date experienced bad weather, but nothing worthy of note occurred until Sept. 1st, on which day the wind very unsteady; in setting foretop gallant-sail carried away the yard in the slings. Sept. 12th, begins with heavy squalls, and sea carried away claw-cringle of the jib. From this date the weather continued very bad, but nothing unusual occurred until Oct'r 24th, which day began with a heavy gale and sea; shipped a heavy sea, broke away spare spars, which were afterwards secured, stove bulwarks, and carried away two doors of the main-deck house; experienced variable and much heavy weather. Dec'r
39 29th, had heavy gales and heavy sea, vessel laboring and straining badly; discovered that the rudder head was badly sprung and temporarily repaired it. 1867, Jan'y 15, a New York pilot came on board and took charge of the vessel; 16th, took a steam-tug, and the same day anchored the ship inside Sandy Hook. 17th, wind W.N.W., vessel lying inside Sandy Hook, surrounded by ice and unable to get to New York; a steam-tug in attendance 18th & 19th; the same, 20th; vessel still enclosed in ice and becoming greatly cut about the bows; still unable to move. 21st, commenced with a strong easterly gale and sleet; ship still lying at East Bay; pilot still in charge; a steam-tug came alongside, and one of the ship's hawsers was passed, but the tug going ahead it was carried away, and the ice coming down the tug was obliged to leave. The ship drifted with the ice, she being badly cut about the bow. At 4 p. m. again passed a hawser to two tugs, and the ship was towed to Staten Island; at 7 p. m. brought up in 10 f'ms water; pumps attended, and were kept free by 5 minutes' pumping for each 12 hours; pumps sounded during the night every hour, and found no more water than usual. Jan'y 22, at 6.30, two tugs came alongside and
40 made fast for towing at 7 a. m.; pumps being sounded, found 26 inches water in the well; at 7.30, ship was observed to be settling; sounded the pumps and found 6 f't water in the well. Finding that the vessel could not be kept free by her own pumps, nor by any other means within reach, it was decided, for the general preservation, to run her ashore as the only means of preventing her from sinking in deep water; and, with the assistance of the tugs, she was put on the Staten Island flats; at 8 o'clock she grounded, then about 10 feet water in the hold, the tide still making. At high water there was nearly 20 f't of water in her. The

captain immediately proceeded to New York for assistance. At 11 a. m., Captain Merritt, of the Coast Wrecking Co., came alongside with a steamer and two schooners, steam-pumps, &c. At 2 o'clock, the captain returned; at 3 p. m., a diver was sent down, who temporarily stopped the leak, and a steam-pump was got to work; at 7.30, commenced discharging cargo into sch'rs. At midnight, water had been reduced to about 8 feet. Jan'y 23d, steam-pump still kept going. Cargo was got out as fast as possible into the sch'rs and sent to New York. Jan'y 24, still continued to discharge cargo; found the main and lower
41 decks very much raised from the linseed swelling in the hold; steam-pump kept working, ship not making much water; at 8.30 p. m. discontinued the discharge of cargo. In discharging into lighters, two packages were lost overboard. Jan'y 25th, at 8.30 a. m., again commenced discharging cargo; found it very hard to get it out, in some cases requiring the use of crowbars and handspikes, it being so much swollen; many bags were broken by handling, or burst by their contents swelling, and some had to be cut. Jan'y 26th, continued discharging cargo; steam-pumps at work, ship making 12 inches water per hour. Jan'y 27th, strong gale from the westward; still discharging cargo; pumps still at work. Jan'y 28th, continued discharging cargo; 29th, continued discharging cargo; diver went down and temporarily repaired the damage done to the port bow by the ice. Jan'y 30th, wreckers still employed working at cargo; steam-pump attended; continued the discharge of cargo. Jan'y 31st, continued the discharge of cargo. Feb'y 1st, at 4 a. m., the ship was started off the ground and was towed to New York; at 7 a. m. she was moved alongside the wharf at Brooklyn, and the men of the Coast Wrecking Co. left the ship. At Brooklyn the cargo was discharged, during which 3 coils of 3-in. cordage was
42 destroyed and used up in breaking out cargo, and a great part of the cargo was damaged in discharging, having swelled and becoming jammed together, and the ship still making considerable water. The Coast Wrecking Co.'s steam-pump was kept on board until Feb'y 9th, when it was discharged, and extra hands were employed to keep the vessel free.

"And the said deponents, on their oaths, declare that the said ship was at the commencement of the voyage aforesaid staunch and strong, and had her cargo well and sufficiently stowed, and her hatches properly closed and secured, and that during the said voyage they, together with the rest of the crew on board, used their utmost endeavours to preserve the said ship, and her cargo, tackle, and apparel, from damage or injury; and that any loss, damage, or injury which has arisen or accrued, or that may arise or be sustained, in any way or manner whatever, is solely owing to the accidents and difficulties herein set forth and declared, and not to any negligence, want of skill, vigilance, or exertion on the part of the deponents, or any of the officers or men of the said ship.

"Master, W. H. SPURR.
"1st mate, JOHN GALGEY.
"2d mate, JOHN McGOVERN.
"Carpenter, JAMES DAVIDSON.
"Seamen, JOHN SEDDON,
"WILLIAM McGEE.

43 "Wherefore the said W. H. Spurr, master and commander as aforesaid, hath requested me to protest, and I, the said notary, at such his request, have protested, and by these presents do publicly and

solemnly protest, against all and every person and persons whom it doth, shall, or may concern, and against all and singular the accidents, casualties, and circumstances already set forth in the foregoing declaration on oath, for all manner of losses, costs, damages, charges, expenses, and injuries whatsoever which the said ship and her cargo on board, and the freight by her earned or to be earned, or either of them, or any part thereof, have already sustained, or may hereafter sustain, by reason or means of the foregoing premises.

"Thus done and protested in the city of New York this sixth day of March, in the year of our Lord one thousand eight hundred and sixty-seven.

"In testimony whereof I have hereunto set my hand and affixed my notarial seal.

[L. S.] (Signed) "A. FOSTER HIGGINS,
"*Not. Pub.*"

The testimony on both sides was here closed.

Whereupon the counsel for the defendants prayed and requested
44 the said judge to charge and instruct the jury aforesaid as follows, to wit:

"First. That it was established by the testimony and evidence given and introduced, that before the master of the said ship 'Oneiza' came to his determination to run or tow the said ship upon the flats or into shallow water, that the sinking of said ship at the spot where she was anchored was, so far as human judgment could determine, certain and inevitable, so that no valuable chance of saving or preventing said ship from so sinking remained or existed, and that therefore the towing or running of the said ship upon the bottom in shallow water, under the circumstances disclosed in the evidence, did not constitute a voluntary stranding within the meaning of the law, so as to make the expenses incurred in repairing the injuries received by the ship from the stranding the proper subject of contribution in general average, and the plaintiffs could not recover of the defendants any portion of such expenses."

But the said judge refused to so charge and instruct the jury aforesaid as requested aforesaid, except so far as the said requests are included in and covered by his charge to the jury as hereinafter given; and to such refusal the counsel for said defendants did then and
45 there, on behalf of the said defendants, except.

And the said counsel for the defendants further prayed and requested the said judge to charge and instruct the jury aforesaid as follows, to wit:

"Second. That it was established by the evidence given and introduced that the stranding or taking of the bottom by the ship 'Oneiza' under the circumstances disclosed by the evidence in the case was not a different stranding or taking of the bottom from what was originally impending in consequence of the damage received from the action of the ice at the time the master of the said ship determined to run or tow her into shallower water, but was a merely incidental and unsubstantial modification of such original stranding or taking of the bottom, and that therefore the expenses incurred for repairing the damage to the ship arising from her going upon and lying upon the bottom were not the proper subject of a general average contribution, and the plaintiffs could not recover of the defendants any portion of such expenses."

But the said judge refused to so charge and instruct the jury afore-

said as last above requested, except so far as the said requests are included in and covered by his charge to the jury as hereinafter given;
46 and to such last-mentioned refusal the counsel for said defendants did then and there, on behalf of said defendants, except.

Third. And the said counsel for said defendants did then and there further pray and request the said judge to charge and instruct the jury aforesaid that it was established, by the testimony and evidence given and introduced as aforesaid, that at the time the said master of said ship came to his determination to run the said ship upon the bottom in shallower water, she was so exposed to the injuries which she sustained from going upon and lying upon the bottom that she could not by any possibility or in any event be saved or rescued from such injuries, and that therefore such injuries were not to be made good by a general contribution, and that the plaintiffs could not recover of the defendants any portion of the expenses incurred in repairing such injuries.

But the said judge then and there refused to charge and instruct the jury aforesaid, as last aforesaid requested, except so far as the said requests are included in and covered by his charge to the jury, as hereinafter given; and to such last-mentioned refusal the counsel for the said defendants did then and there, on behalf of said defendants, except.

47 Whereupon the counsel for the said defendants further prayed the said judge to charge and instruct the jury aforesaid as follows, to wit:

"Fourth. That if the said jury found, from the evidence aforesaid, that the stranding or taking of the bottom by the ship 'Oneiza,' under the circumstances disclosed by the evidence aforesaid, was not a different stranding or taking of the bottom from what was originally impending in consequence of the damage received from the action of the ice at the time the master of said ship determined to run or tow her into shallower water, but was a merely incidental and unsubstantial modification of such original stranding or taking of the bottom, that then the expenses incurred for repairing the damage to the ship, arising from her lying upon the bottom, were not the proper subject of a general average contribution, and the plaintiffs could not recover from the defendants any portion of such expenses.

"Fifth. That, unless at the time the master of said ship came to the determination to run her upon the flats, there was a substantial and valuable chance that the said ship might be kept from sinking where she was anchored, which chance the said master voluntarily abandoned, the injuries sustained by said ship in consequence of lying upon
48 the bottom are not a proper subject for general average contribution, and the plaintiffs cannot recover in this action any portion of the expenses incurred in repairing such injuries.

"Sixth. That if the ship was, at the time the master came to his determination to run her upon the bottom in shallower water, so exposed to the injuries which she sustained from going upon and lying upon the bottom, that such injuries could not by any possibility or in any event be prevented, such injuries are not to be made good by a general average contribution, and the plaintiffs cannot recover in this action any portion of the expenses incurred in repairing such injuries.

"Seventh. That there is no evidence in the case sufficient to show that the said ship lay upon an uneven bottom, or that the spot where she took the ground was in any respect more unfavorable to the ship than the bottom where she lay at anchor.

"Eighth. That there is no evidence in the case from which the jury can determine what particular repairs were rendered necessary by the ship lying on the bottom, and what were rendered necessary by the swelling of the cargo; and that, as it appears that both these
49 causes concurred in producing the injuries to the ship, one-half of such injuries should be deemed to have been occasioned by the one cause, and one-half of the other, as the nearest practicable approximation to justice.

"Ninth. That inasmuch as it appeared that all the freight on the cargo had been collected, and the disaster happening at the very entrance of the port of destination, such freight should contribute in general average upon its full value, after deducting such expenses, if any, as were necessarily incurred in order to earn it; and the jury should, in making up their verdict, so estimate the contributory value of freight."

And the said judge did then and there, in respect to each of such six requests last above mentioned, separately refuse to charge and instruct the said jury as requested in the several respects above mentioned, except so far as such requests were in substance granted by the instructions and charge of the said jury, actually made by the said judge and hereinafter set forth; and the said counsel for the said defendants did then and there insist that the said requests were not, nor was either or any of them, in substance granted by the said charge and in-
50 structions of the said judge, and did then and there severally except to the refusal, and each of the refusals, of the said judge to charge and instruct the jury as above requested.

And the said judge did then and there charge the said jury that if they found from the evidence that the ship and cargo were exposed to a common peril of sinking, and becoming submerged in deep water; and that the expenses of raising and saving them from such place would have beep greater than if stranded in shoal water; and that the master, to save the ship and cargo from such increased expenses, ran the ship on the flats, and so stranded her in shoal water, and thereby increased the peril to the ship and diminished the damages and expenses of saving the ship and cargo, then there was a voluntary stranding within the meaning of the law, and the plaintiffs are entitled to recover from the defendants in general average their just proportion of all damages and expenses occasioned thereby.

To which the counsel for the defendants then and there excepted, both on the ground that the proposition charged was erroneous in law, and also on the ground that there was not sufficient evidence to warrant the jury in finding that the ship and cargo were exposed to a common peril.

51 And the said judge did then and there further charge the said jury that if they found from the evidence that no water entered the ship which reached and damaged the cargo, except what came through the holes cut in the bows by the ice, that then the defendants were not entitled to be allowed anything for the damages to their cargo by water, by way of general average, or by way of reduction of the plaintiffs' claim, because such damages were not caused by or the result of the act of stranding the ship, but were caused by a peril of the sea which had overtaken the cargo before it was determined to strand the ship.

To which the counsel for the defendants then and there excepted.

And the said judge did then and there further charge said jury that the plaintiffs were entitled to recover in general average only those expenses which were caused by stranding the ship, not including any

occasioned by damage to the ship through the swelling of the cargo caused by water which entered through the holes in the bows; and therefore, if the jury found from the evidence that the ship was injured by such stranding and by lying on an uneven bottom, then the plaintiffs were entitled to recover the expenses for repairing such injuries,
52 by way of general average, and it was for the jury to determine from the evidence what such repairs amounted to.

To which defendants' counsel then and there excepted, on the ground that there was no evidence in the case sufficient to enable the jury to make the discrimination.

And the said judge did then and there further charge the said jury that if they found from the evidence that in respect to the contributory value of freight the adjustment, as made up by Johnson and Higgins, the average adjusters, was according to the usage and custom of the port of New York, and if they found that no more had been allowed for damages to the ship than was attributable to the stranding, then the plaintiffs were entitled to their verdict for the amount stated in the average adjustment to be due from the defendants to the plaintiffs as their general average contribution, with interest from the date of the said adjustment.

To which the defendants' counsel then and there excepted.

And the said judge, under the charge and with the directions aforesaid, inter alia, left the aforesaid issue and the evidence so given on the trial thereof as aforesaid to the said jury, and the said jury then
53 and there gave their verdict for the said plaintiffs for twelve thousand and seventy-seven dollars and seventy-three cents damages.

And inasmuch as none of the said exceptions so offered and made to the opinion and decision of the said judge do appear upon the record of the said trial, therefore, on the prayer of the said defendants, by their counsel, the said judge hath to this bill of exceptions put his seal, according to the statute in such case made and provided, this fourth day of June, in the year one thousand eight hundred and sixty-eight.

SAM'L BLATCHFORD, [L. S.]
District Judge.

Whereupon, all and singular the premises being seen and by the court here fully understood, and mature deliberation being thereupon had it appears to the said court now here that the verdict aforesaid of the jurors aforesaid, in form aforesaid given, is in all respects good and valid in the law, anything in the said bill of exceptions contained to the contrary in any wise notwithstanding.

54 Wherefore it is considered that the said plaintiffs do recover against the said defendants their said damages, costs, and charges by the jurors aforesaid in form aforesaid assessed, and also seven hundred and seventy-six dollars and forty cents for their said costs and charges by the said court now here adjudged of increase to the said plaintiffs and with their assent, which said damages, costs, and charges in the whole amount to twelve thousand eight hundred and fifty-four dollars and nineteen cents.

And the said defendants in mercy, &c.

$12,077 73; 06; costs, 776 40—$12,854 19.

Judgment signed this 6th April, 1869.

R. E. STILWELL,
Deputy Clerk.

(Endorsed:) U. S. circuit court. William Rathbone & als. vs. Frederick R. Fowler & o'rs. Judgment record. Owen, Nash & Gray, att'ys for pl'ffs. Filed April 6, '69.

55, 56

57 EXHIBIT "A."

Scudder & Carter, def'ts' att'ys; Owen, Nash & Gray, pl'fs' att'ys.

Statement of general average in the case of the ship "Oneiza"—Spam, master.

This vessel sailed from Calcutta, on the 4th August, 1866, laded with linseed and other cargo, & bound for New York.

Aug. 13th. During a gale, the inner jib was split.

Sept. 1st. The weather was unsteady, & in setting the foretop gallant-sail, the yard was carried away in the slings.

Oct. 24th. Came in with a gale and a high sea, which broke on board, staving in the bulwarks, and carring away two doors of the main deck house.

Dec. 29th. Encountered a gale and a heavy sea, which caused the vessel to labor and strain severely, & the rudder-head was found to be badly sprung, and was temporarily repaired.

1867, Jan 15. A pilot was taken, & Jan'y 16th, the vessel ar-
58 rived at the entrance of the harbour of New York. There being too much ice in the bay for her to attempt to go to the city, she was anchored inside of Sandy Hook, where she remained, unable to move, and surrounded by ice which was floating with the tide, and by which she was cut about the bows, until Jan'y 21st, on which day, a steam-tug was engaged to tow her up the bay, and the ship's hawser was passed, but as the tug went ahead, the hawser parted, and the floating ice came down the bay with such force, that the tug was obliged to leave. At 4 p. m. two tugs were procured, in tow of which the ship proceeded to Staten Island, where she came to anchor at 7 p. m., the night being too thick to keep on. The pumps were tried every hour, and the ship was found to be making no more water than usual.

Jan'y 22d. At 6.30 a. m., the tugs were in attendance and made fast to tow the ship to the city; at 7 a. m., it was observed that she was settling, and upon examidation it was found that there were 6 feet of water in the well, and that she was leaking rapidly. It being impossible to keep her free by her own pumps, and there being no assistance within reach, it was determined to run her ashore, and she was accordingly, by the aid of the two tugs, put upon the Staten Island flats, where
59 she grounded at [at] 8 o'clock; and at high tide, at about noon, there were 20 feet of water in her hold. The captain proceeded immediately to N. Y. for assistance. At 11 a. m., Capt. Merritt, of the Coast Wrecking Co., came alongside with a steamer, schooner, steam-pump, &c. A diver was sent down, and the principal leak, which was found to have been caused by a bow port being stove in by the ice, was temporarily stopped. A steam-pump was got to work, and, at 7.30 p. m., commenced discharging cargo into lighters and sending it to New York. At midnight, the water was reduced to about 8 feet. From this date the discharging of the cargo into lighters was continued, and, as it came out, it was sent to New York. It having been entirely submerged, the linseed was found to be much swollen, to such an extent that the vessel's decks were somewhat forced up, and a few became broken, and the cargo was so jammed that crowbars had to be used to seperate the

packages, and some bags of linseed, and bales of gunny bags and cloth were cut open, to enable them to be got out.

Feb'y 1st. At 4 a. m., the ship was started off the ground and was towed to Brooklyn, where the remainder of the cargo was discharged.

60 During the entire time from the 9th Feb'y, the steam-pump was required on board to keep the vessel free, and, in the course of the discharging, 3 coils of 3-in. cordage was used up in breaking out cargo.

62, 63			General average.		Special charges on freight.	Owners.
			½ off.	Net.		
	J. F. Small, Pilot-boat No. 5:					
194 75	For pilotage from sea & of 22 feet	188 75				
	" detention 4 days	12				
		194 75				194 75
	Steamer "Annie:"					
20	For towing from Highlands to Southwest Spit	20				20
	Propeller "Trajan:"					
54	For services rendered going to Lower Bay, 4½ hours	54				54
	Steamer "Annie:"					
70	For services rendered carrying stores, 7 hours, a $10 per hour	70				70
	Michael Conway:					
55	For attendance on ship while lying on shore at Staten Island for 11 days, at $5 p'r day	55			55	
	Steamer "Annie:"					
70	For services rendered carrying stores, 7 hours, a $10 per hour	70				70
	Carried forward				55	408 75
463 75	64, 65 Brought forward			55		408 75
	Steamer "Andrew "Fletcher:"					
700	For services, towing from sea	700				700
	Steamer "Seth Low:"					
100	For services rendered, 4 hours, a $25, (towing ship ashore and lying by her while ashore)	100		100		
	Steamer "Andrew Fletcher:"					
512 50	For services, waiting on ship 20½ hours, a $25, (while ashore)	512 50		512 50		
	Edward A. Bibby & Co.:					
474 75	For port charges on ship "Oneiza"	459 55				
	" general order permit	20				
	" internal revenue stamps	5				
	" brok'ge	10				
		474 75				474 75

Charges & expenses—Continued.

			General average.		Special charges on freight.	Owners.
			½ off.	Net.		
5	Farmer & Sullivan:					
	To running lines & attending on ship (upon arrival at Brooklyn)	5				5
2,256 00	Carried forward			667 50		1,588 50
2,256 00	66, 67 Brought forward			667 50		1,588 50
	R. Yates, Pilot-boat No. 5:					
42 25	For pilotage from qua'ntine, 26 feet, (quarter pilotage)	42 25		42 25		
	G. Ross & Son:					
27 54	For 618 feet spruce timber, *a* 30c	18 54				
	" cartage, Robert Stores	50				
	" 12 1¼-in. pine plank, 52c.	6 24				
	" 22 ft. 2 " " "	1 76				
	" cartage	50				
	(For discharging stages, &c.)	27 54				27 54
	James McNeice:					
189 48	For repairing caboose, kitchen untensils, &c	189 48				189 48
	Hamilton Waddell:					
37 70	For 1 bbl. extra flour	17				
	" 5 bbls. navy bread, 320, *a* 6	19 20				
	" 5 " *a* 30 c'ts	1 50				
		37 70				37 70
1,069 63	For Hicks' stores	1,069 63				1,069 63
3,622 60	Carried forward			709 75		2,912 85
3,622 60	68, 69 Brought forward			709 75		2,912 85
	Edmonds, Kirby & Co.:					
8	For 1 ton egg coal	8				8
	Coast Wrecking Co.:					
12,123 81	To sch'r "Henry W. Johnson," serv's Jan'y 23d–Feb'y 1st, inclusive, 10 days, at $50	500				
	" sch'r "J. G. Rotche, serv. Jan'y 23d–Feb'y 1st, inclu., 11 days, *a* 50	550				

| | | |

Charges & expenses—Continued.

				General average.		Special charges on freight.	Owners.
				⅓ off.	Net.		
		For J. Corniskey, wrecker..... 10 " 4 " "	56				
		Forward.....	9,227 90				
		Carried forward.....			709 75		2,920 85
15,754 41	72, 73	Brought forward.....			709 75		2,920 85
		Coast Wrecking Co.—(continued:)					
		Brought forward.....	9,227 90				
		For T. Goggin, wrecker..... 10 days 4 nights, 4	56				
		" D. Downey, " ..... "	56				
		" Jas Lewis, " ..... 10 " 4 " "	56				
		" J. Bragan, fireman..... 10 " 12 " 5	110				
		" Thos Wood, wrecker..... 8 " 3½ " 4	46				
		" W'm Arthur, " ..... 10 " 4 " "	56				
		" T. Palmer, " ..... 10 " 4 " 4	56				
		" J. Henning, " ..... 8 " 2½ " "	42				
		" D. Williams, " ..... 4 " " "	16				
		" J. Chittenden, " ..... ½ " "	18				
		" G. W. Carver, " ..... 4 " " "	16				
		" Tho's Heath, " ..... 2 " 1 " "	12				
		" D. Sheehan, T. Bunedick, W. Berry, 2 day on ea. 6 3	36				
		" J. W. Jenkins, taking ac. of cargo, and discharging lighters, 15 days, $5.....	75				
		" J. J. Merritt, gen. agent.....	500				
		" Submarine diver and apparatus.....	300				
		" 3 coils, 3-in. Manilla, 1,789 lbs. at 22½ct. per lb.....	177 53				
		" 3 doz. cotton hooks, a 50c. per pair.....	9				
		" 3 cords wood, 12 50.....	37 50				
		" 16 lanterns, lost & broken, 1 25.....	20				
		" 15 pair box hooks " "	30				
		" 1 " large cargo toungs.....	6 50				
		" 8 12-in pat. d'ble blocks.....	26 66				
		" 6 " " pat. single.....	10				
		" 1 anchor, 3,000 lbs, 2½ct. per lb.....	75				
		" 1 buoy rope.....	10				
		Forward.....	11,081 09				
15,754 41		Carried forward.....			709 75		2,920 85
15,754 41	74, 75	Brought forward.....			709 75		2,920 85

		Coast Wrecking Co.—continued:						
		Brought forward	11,081 09					
		For 1 5-in. fall	68 64					
		" surf boat 10 days, *a* 7 50	75					
		" 20 y'ds canvass, at 90c	18					
		" 6 pine boards, 1 20; 25 lbs. spikes, 8, [25]	3 20					
		" 15 lbs. nails, 12, 6 80; 1 ton coal, 7 50	9 30					
		" 3 steel crowbars lost, 4 50	9					
		" 10 gall's oil, 2	20					
		" 1 axe, lost from the pump, 2; 2 cold chisels, 2	4					
		" use of steam-pump, Jan'y 22, to Feb'y 9th, inclusive, 18 days' steam, at $40	720					
		" 1 day no steam	20					
		" use hoisting engine, 9 days used, *a* 30	270					
		" clearing steam-pump	15					
		" " " hoister	15					
		" R. Thompson, bill, 6 grapplings	7 75					
		" D. Patterson's bill, expenses, steel for chisels	15 57					
		" A. R. Pardie's bill, expense on material	7 25					
		" st'r Niaaga, towage, $20, 10, & 40	70 00					
		" Mulford & Wandell, 12 cords wood planking	153 90					
		" J. W. Jenkins, expenses to & from wreck, & labor	5 00					
		" Tho's A. Miller, meals furnished while at pump	12 95					
		" Tho's McCarty, 1½ cords wood, sawing	23 91					
		" st'r "Niagara," towing ship from quarantine to dock, extra	100 00					
		" st'r President, towing sch. E. L. Pearce	15 00					
		" " " " Only Son	15 00					
		" " Edmonds, Kirby & Co., pine wood & sawing, 3 cords	40 50					
		Forward	12,795 06					
15,754 41		Carried forward				709 75		2,920 85
15,754 41	76, 77	Brought forward				709 75		2,920 85
		Coast Wrecking Co.—continued:						
		Brought forward	12,795 06					
		Less:						
		Deduction of $2 50 p'r hour on steamer's time of 238½ hours	596 25					
			12,198 81					
		Less:						
		Deduction for anchor not used	75					
			12,123 81			12,123 81		
		Steamers "Niagara" and "B. Page:"						
30		For towing from Brooklyn, Robert's stores, to sectional dock	30	30				
		United States:						
28		For services of discharging officer, for seven days' overtime, *a* $4 per day	28			28		
		W'm A. Freeborn & Co:						
4,298 18		For 2,784 sheets, 19,979 lbs., 27	5,394 33					
		" cartage	9 50					
		" 48 sheets keel metal, 498 lbs., 29	144 42					

Charges & expenses—Continued.

				General average.		Special charges on freight.	Owners.
				⅓ off.	Net.		
	For 781 lbs. Manilla		179 63				
	" 8 bbls. tar, 5		40				
	Forward		5,767 88				
20,110 59	Carried forward			30	12,861 56		2,920 85
20,110 59	78, 79 Brought forward			30	12,861 56		2,920 85
	W'm A. Freeborn & Co.—continued:						
	Brought forward		5,767 88				
	For 4,382 sheets felt, 20 × 32, 8		350 56				
	" 41 lbs. zinc tacks, 30c		12 30				
	" comp. nails, 3,042, net 100—2,942 lbs., 27		794 34				
	" 28 water marks		7				
	" 1 brass strainer		2				
	" 15 lbs. stem nails, 30		4 50				
			6,938 58				
	Credit:						
	13,418 lbs. old metal, 18	2,415 24					
	1,242 " " nails, 18	323 56					
	20 " " lead, 8	1 60					
		2,640 40					
			4,298 18	4,298 18			
	Robert & Co.:						
129 33	For wharfage from Feb'y 1st, to Feb'y 28th, '67, 27 days, inside, at 4 79		129 33				
	Usual time of discharging, 19 days						91 01
	Extra time in consequence of damage, 8 days, to special charges on freight					38 32	
	Steamer "President" and "Niagara:"						
30	For services rendered assisting on dry-dock		30	30			
20,269 92	Carried forward			4,358 18	12,861 56	38 32	3,011 86
20,269 92	80, 81 Brought forward			4,358 18	12,861 56	38 32	3,011 86
	Martin & Conway:						
10	For two days' boat hire, docking ship		10	10			

116 11	F. H. Janes & Co.:					
	For packing & weighing 14,660 lbs. old metal, *a* 35c	51 31				
	" labor under bottom, picking up metal	16 80				
	" " " " cleaning and washing old nails	42 60				
	" " " " picking up new nails	5 40				
		116 11	116 11			
	C. C. Freeman, (Pilot-boat No. 5:)					
5	For pilotage to landing berth	5				5
	John Puller:					
3	To running lines at graving-dock	3	3			
	Steamers "Gladiator" & "Niagara:"					
30	For towing from sectional dock to 6th st., E. R., ship-carpenter's yard	30	30			
20,434 03	Carried forward		4,517 29	12,861 56	38 32	3,016 86
20,434 03	92,83 Brought forward		4,517 29	12,861 56	38 32	3,016 86
	N. Y. Floating Dry-dock Co.:					
1,084 75	For raising 1,403 tons, *a* 30c	420 90				
	" one lay day, " 20c	280 60				
	" " " " " 25c	350 75				
	" copping keel	32 50				
		1,084 75	1,084 75			
	Geo. T. Balew:					
136 40	For clerk attendance to cargo Jan'y 24th to Feb'y 20th, inclusive, 31 days, $4 per day	124 00		12 00		
	" extra clerk on schooners, 3 days, *a* $4 per day	12				
	" receipt book	40				
		136 40				124 40
	W'm B. Dunley:					
42 42	For bunching 2,828 sheets metal, *a* 1½c	42 42	42 42			
	T. Guthrie:					
315 37	For rep'g jack foresail, 39½ y'ds No. 3, from ship					
	" 108 y'ds No. 2, repairs, 56c	60 48				
	" 2 doz. grummets, 1 reef point, & 1 strand	75				
	" 5 lbs. twine, 80c	4				
	" labor, 14 days	49				
	" rep'g mizen topsail, 64 yards No. 3, 54c	34 56				
	Forward	148 79				
22,012 97	Carried forward		5,644 46	12,873 56	38 32	3,141 26

Charges & expenses—Continued.

84, 85			General average.		Special charges on freight.	Owners.
			¼ off.	Net.		
22, 012 97	Brought forward		5, 644 46	12, 873 56	38 32	3, 141 26
	T. Guthrie—continued:					
	Brought forward	148 79				
	For new leech ropes, foot ropes, & 10 cringles, 90 lbs., at 26	23 40				
	" 12 new reef points, 18c each	2 16				
	" 1 doz. grummets, 20c	40				
	" 4½ lbs. twine, 80c	3 60				
	" labor, 11 days, 3 50	38 50				
	" rep'g topgal't-sail, 102 yards No. 3, rep'g, 54c	56 32				
	" 2 doz. grummets & 1 strand	50				
	" labor, 10 days, at 3 50	35				
	" cartage	1 50				
	" 4 lbs. twine, 80c	3 20				
		315 37				315 37
	Alfred B. Sands:					
41 46	For 26 lbs. lead pipes, for tanks, a 14c	3 64				
	" 11 " solder " " " 50	5 50				
	" blacksmith's bill for alter. & repair. graining	8				
	" 2 brass bolts & tapping air-vessel of pumps	3				
	" leather for pump-boring valves	2				
	" plumber & helper, 3 days each, a 36s. & 20c	21				
	Credit:	43 14				
	21 lbs. old lead, 8c	1 68				
		41 46				41 46
22, 054 43	Carried forward		5, 644 46	12, 873 56	38 32	3, 498 09
22, 054 43	86, 87 Brought forward		5, 644 46	12, 873 56	38 32	3, 498 09
	A. B. Church:					
63 95	For rep'g rudder brace, 24 f	3				
	" 239 lbs. tiller, 20c	47 80				
	" rep'g bumkin, 34 lbs. iron, 8c	2 72				
	" 1½ day's labor to forge, $10 per day	15				
	" clinch rings, a 3c	18				
		68 70				

	Credit:					
	95 lbs. old iron tiller, 5c	4 75				
		63 95				63 95
	Steamer "Niagara" and "Morgan:"					
40	For towing from 7th st., E. R., to Pier 19, E. R., (to load after repairs)	40 00				40
	Ja's R. Murphy, (Pilot-boat No. 3:)					
5	For pilotage from Brooklyn to sea, dock	5 00	5			
	George Brown:					
115 17	For wharfage at Pier No. 65, foot of 5th st., E. R., from 5th to M'ch 28th, 23 days, a 5 00 ¼, while repairing	115 17	115 17			
22,278 55	Carried forward		5,764 63	12,873 56	38 32	3,602 04
22,278 55	88, 89 Brought forward		5,764 63	12,873 56	38 32	3,602 04
	H. Dennie, (Pilot-boat No. 5:)					
5	For transportation from 4th st., E. R., to 19, E. R.	5				5
	Banker & Wood:					
260	For putting 200 stone ballast, a 1 25 per ton	250				
	" taking away rubbish	10				
		260				260
	Mrs. Campbell:					
52	For scouring paintwork between decks and upper deck	52	40			12
	Richard Martin:					
4	To running lines docking ship	4	4			
	Tho's Newton:					
60	For scraping outside & upper deck	60	50			10
22,659 55	Carried forward		5,858 63	12,873 56	38 32	3,889 04
22,659 55	90, 91 Brought forward		5,858 63	12,873 56	38 32	3,889 04
	Connally & Bro.:					
600	For painting deckwork, boats, spars; one coat, between decks; old work, one coat; new work, two coats & puttyed; outside ship, two coats; and finding all the materials, as per agreement	600	500			100
	The Westervelt ship-yard:					
13,437 04	For labor & materials, furnished in accordance with the requirements of surveyors, as follows:					
	" 231½ days, carpenters & fasteners, 4 95	1,147 16				
	" 689¼ " " " 4 40	3,033 80				1,045 24
	" 318 " caulkers, 4 95	1,574 10				
	" 339 " " 4 40	1,491 60				
	" 47½ " " 2	95				
	" 162½ " joiners, 4	650				162 50
	" 20 " laborers, 2 25	45				11 15
	" 1,164 feet oak rudder stock & backing, 8c	93 12				93 12

Charges & expenses—Continued.

				General average.		Special charges on freight.	Owners.
				¼ off.	Net.		
	For 1,926 feet oak lower deck waterway, 8c		154 08				
	" 420 " " fishing beams, 8c		33 60				33 60
	" 3,038 " " outside plank, 8c		243 84				243 84
	" 392 " " bow ports, 8c		31 36				31 36
	" 18 " " port bow, 8c		1 44				1 44
	" 80 " " battens on sheathing, 8c		6 40				1 60
	Forward		8,600 50				
36,696 59	Carried forward			6,358 63	12,873 56	38 32	5,612 99
36,696 59	92,93 Brought forward			6,358 63	12,873 56	38 32	5,612 99
	The Westervelt ship-yard—continued:						
	Brought forward		8,600 50				
	For 33 feet oak graven pieces, between decks, 8c		2 64				2 64
	" 38 " " used for hatches, 8c		3 04				
	" 88 " " hatch carlins, 8c		7 04				
	" 6,210 " yellow pine, on lower deck waterway, a 6c		372 60				
	" 5,975 " " " strings and upper deck beams, a 6c		358 50				
	" 5,460 " " " diagonal bracing, 6c		327 60				
	" 8,688 " " " outside sheathing, 6c		521 28				130 32
	" 121 " " " piecing head stern-post		7 26				7 26
	" 33 " " " graven pieces between d'ks, 6c		1 98				
	" 96 " " " hatch combings, 6c		5 76				5 76
	" 267 " white " bulkhead, 6c		16 02				
	" 155 " " " upper deck plank, 7c		10 85				10 85
	" 220 " " " hatches, 7c		15 40				
	" 27 " rep'g carved head, 7c		1 89				1 89
	" 518 " spruce lower deck plank, 5c		25 90				25 90
	" 132 " " lumber boards, 5c		6 60				
	" 260 turned locust trenails, 8c		20 80				
	" 110 " " " 9c		9 90				
	" 100 " " " 10c		10				
	" 31,200 y. pine cling wedges, p'r M, 10		312				
	" 750 " " trenails, 2		1 50				
	" 372 oak ship wedges, 5c		18 60				
	" 370 w. pine deck plugs, p'r M, 3		1 11				
	" 300 " " " " " " 2 50		75				
	" 160 " " " " " " 2		32				
	" 2 ladders, for ship's use		16				

		Forward		10,675 84			
36,696 59		Carried forward			6,358 63	12,873 56	38 32	5,797 61
36,696 59	94, 95	Brought forward			6,358 63	12,873 56	38 32	5,797 61
		The Westervelt ship-yard—(continued:)						
		Brought forward		10,675 84				
		For carving trail boards, repaired		5				5
		" 35 lbs. sperm candles, 45c		15 75				
		" 30 " white lead, 16c		4 80				
		" 2½ galls. oil, 180c		4 50				
		" 35 lbs. cut nails, 10c		3 50				
		" 26 " y. metal bolts, 32c		8 32				
		" 93 " galv'd nails, 15c		13 95				
		" 1,042 " " spikes, for sheathing, 15c		156 30				39 08
		" 654 " iron spikes, 11c		71 94				35 97
		" 13,180 " " bolts, 10c		1,318				
		" straightening and rep'g 1,445 lbs. old bolts, 5c		72 25				
		" 4 comp'n rings & staples		80				
		" 3 brass bolts		2 44				2 44
		" 11 doz. brass, & 5 doz. iron screws		5 55				5 55
		" 1 cast brass plate, for sofas		1 20				1 20
		" 4 brass mortice locks		10				10
		" 2 comp'n knob latches		3 50				3 50
		" 2 spindles & 1 knob for latch		1 50				1 50
		" 5 pair porcelain knobs & brass spindles		6 25				6 25
		" 8 brass & iron buttons & plates		90				90
		" 6 " hooks & staples, eyes, & plates		90				90
		" 2 iron hasps and plates		1				1
		" 1 common door lock		75				75
		" rep'g 20 augurs, 25c		5				
		" " 25 " 15c		3 75				
		" " 12 steel cold chisels, 25c		3				
		Forward		12,396 69				
36,696 59		Carried forward			6,358 63	12,873 56	38 32	5,911 65
36,696 59	96, 97	Brought forward			6,358 63	12,873 56	38 32	5,911 65
		The Westervelt ship-yard—(continued:)						
		Brought forward		12,396 69				
		For rep'g 23 steel start hammers, 25c		5 75				
		" " 10 " drift bolts, 15c		1 50				
		" " 16 " slice bars, 20c		3 20				4 83
		" " 3 " deck starts, 75c		2 25				
		" " 33 decks & timber dogs, 20c		6 60				
		" " 15 candles, trenail irons, 6c		90				
		" " 2 schackle bars, 25c		50				50
		" " 27 ribbon screws, 10c		2 70				
		" " 22 iron wedges, 15c		3 30				
		" " 20 iron clamps, 20c		4 00				

Charges & expenses—Continued.

				General average.		Special charges on freight.	Owners.
				¼ off	Net.		
	For rep'g 40 reeming irons, 20c		8				4
	" " 5 stanchion straps		15				15
	" " 2 windlass whelps		1 25				1 25
	" " 4 hatch ring bolts		50				
	" " 8 eyebolts for ports		2 00				2
	" " eyebolt and chain for bumpkin		1 50				
	" altering rudder band		2				2
	" am't of A. B. Church's bill of iron tiller, & repairing rudder, brace, & bumpkin		63 95				63 95
	" 73 lbs. iron stantion straps, 18c		13 14				13 14
	" 45 port plates, 18c		8 10				8 10
	" 31 windlass whelps, 18c		5 58				5 58
	" 2 eyebolts and 1 plate		1				1
	" 1 dog, for securing cable		25				
	" 41 lbbs. eyebolts & shackles, 20c		8 20				8 20
	" 6 hatch ring bolts		3				
	Forward		12, 560 86				
36, 696 59	Carried forward			6, 358 63	12, 873 56	38 32	6, 041 20
36, 696 59	98, 99 Brought forward			6, 358 63	12, 873 56	38 32	6, 041 20
	The Westervelt ship-yard—(continued:)						
	Brought forward		12, 560 86				
	For 8 lbs. eyebolts for rudder, 20c		1 60				1 60
	" 14 " rudder bolts, 13c		1 82				1 82
	" 36 " " irons, 20c		7 20				7 20
	" 112 " plate nails, 5c		5 60				5 60
	" 24 " " " 8c		1 92				1 92
	" 12 " rivets, 5c		60				60
	" 44 clinch rings, 3c		1 32				
	" 254 " " 5c		12 70				
	" 229 " " 6c		13 74				
	" 330 galv. clinch rings, 8c		26 40				
	" 6 large rings		1				
	" 2,245 lbs. spun oakum, 16c		359 20				
	" 16 bbls. pitch, 5 50		88				
	" 8 pitch mops, 75c		6				
	" 2 graving mops, 1 00		2				
	" 144 days' boat stages, 1 00		144				18
	" use of waste of staging, cross-spalls, shores, &c		50				

	" truckages & cartages		155				51 67
			13,444 96	11,304 39			
	Credit:						
	246 lbs. old iron, at 2c.,	4 29		17,663 02			
	15 lbs. y. metal " 20c.,	3 00					
			7 92	Cr. 7 92			
			13,437 04				
36,696 59				17,655 10	12,873 56	38 32	6,129 61
36,696 59	100, 101 Brought forward			17,655 10	12,873 56	38 32	6,129 61
	W'm G. Hynard:						
1,966 00	For 91 days' foreman's time, discharging and riggers' work, hauling & pumping ship, a 5		456				
	(For hauling & pumping while discharging, to general average)				265		
	" 294 days' headers' time, a 4½		132 75				
	" 280 " labor's time, " 4		1,120				
	" 364 " horse & man, " 6½		235 67				
	" ferriage of men to Brooklyn		22 62				
			1,966 00				
	(Ordinary expense of discharging, $800)						800 00
	(Extraordinary expense, in consequence of damage to cargo, to special charges on freight)					911 00	
	T. L. Randlett & Son:						
122 74	For cartage on sterer, from 5th st., E. R.		2				
	" rep'g patent steering apparatus		119 99				
	" cartage to pier 17, E. R.		75				
			122 74				122 74
	Henry F. Falson:						
37 82	For medicines		27 82				
	" 2 galls. whiskey		10				
			37 82				37 82
38,823 15	Carried forward			17,655 10	13,138 56	949 32	7,090 17
38,823 15	102, 103 Brought forward			17,655 10	13,138 56	949 32	7,090 17
	McMurray & Damaroll:						
175 82	For groceries, &c., supplied		175 82				175 82
	Charles L. Wright & Co.:						
64	For fees paid at custom-house		31 10				
	" " " " consul's		32 90				
			64				64 00
	Banker & Wood:						
378	For putting in 280 tons stone ballast, a 1 35 per ton		378				378 00

Charges & expenses—Continued.

			General average.		Special charges on freight.	Owners.
			¼ off.	Net.		
	Stephen Williams:					
878 68	For 4,414 lbs. beef, for harbor & sea use, *a* 16c	706 24				
	" salt, eggs, vegetables, bread, &c	172 44				
		878 68				878 68
	William Cooper:					
31	For 6,200 Ridgewood water	31				31
	T. E. Dillon & Co.:					
6 50	For rating chronometer, 5 00; rep'g clock, 1 50	6 50				6 50
40, 357 15	Carried forward		17, 655 10	13, 128 56	949 32	8, 624 17
40, 357 15	104, 105 Brought forward		17, 655 10	13, 128 56	949 32	8, 624 17
	Pinder & Hogan:					
269	For 8 riggers, 1 day unmooring ship, hauling out and remooring, *a* $5 per day	40				
	" trimming ballast for cotton, 1 day, 10 men, *a* 4 per day	40				
	" gratuity berthing ship, harbor-master	25				
	" trimming ballast for sea, 7 men, 1 day, *a* 4 per day	28				
	" jib-boom and setting up head-gear	96				
	" 8 riggers 1 day, to take ship in stream for sea, at $5	40				
		269				269
	Van Hœsen & Bro., (merchants' police:)					
168	For watching vessel, &c., from Feb'y 1st to April 19th, inclu., 78 nights, *a* $2	156		76		
	" vessel on dry-dock	12		12		
		168				80
	S. A. Frost:					
113 85	For wharfage from Mar. 28th to 20th April, 23 days, *a* 4 95, pier 19, E. R., (while loading)	113 85				113 85
	John Haveson:					
312	For cash advanced 9 seamen, $20 ea	180				
	" " " 5 " " 10 "	50				
	Forward	230				
41, 221 00	Carried forward		17, 655 10	13, 216 56	949 32	9, 087 02
41, 221 00	106, 107 Brought forward		17, 655 10	13, 216 56	949 32	9, 087 02

41, 221 00		Carried forward		17, 655 10	13, 216 56	949 32	9, 087 02
41, 221 00	106, 107	Brought forward		17, 655 10	13, 216 56	949 32	9, 087 02
		John Haveson—(continued:)					
		Brought forward	230				
		For cash advanced one seaman, 20	20				
		" shipping fee & papers, a $3 ea	60				
		" Brooklyn to Staten Island	3				
			313				313
		S. A. Frost:					
4 95		For wharfage from April 20-22, 2 days, at 2 47½, pier 19, E. R., (while loading)	4 95				4 95
		Van Hœsen & Bro.:					
4		For watching vessel, &c., April 20th & 21st, (while loading)	4				4
		George Staker:					
19 50		For your proportion of cable message	19 50				19 50
		John Turner:					
2		For running lines and attending on ship	2				2
41, 251 45		Carried forward		17, 655 10	13, 216 56	949 32	9, 430 47
41, 251 45	108, 109	Brought forward		17 655 10	13, 216 56	949 32	9, 430 47
		Steamer "W'm Fletcher:"					
90		For towing from Pier 20, E. R., to sea	90				90
		R. Yates, (Pilot-boat No. 5:)					
40 10		For pilotage to sea, 13 feet	35 10				
		" hauling in stream	5				
			40 10				40 10
		Richard Martin:					
4		For running lines undocking ship	4				4
		Joseph Mount:					
55		For shipsmith's work on ship—					
		" Calvin steel, rep'g rail & anchor davit	55				55
		Robert Mackie & W. W. Story:					
100		For sundry surveys	100		50		50
		Board of wardens:					
33 50		For sundry surveys	33 50		16 75		16 75
41, 574 05		Carried forward		17, 655 10	13, 283 31	949 32	9, 686 32
41, 574 05	110, 111	Brought forward		17, 655 10	13, 283 31	949 32	9, 686 32
1, 039 35		Commission on disbursements, 2½%	1, 039 35	441 37	332 08	23 74	242 16
1, 333 83		Interest on disbursements from average date of payment to probable date of settlement, 5½ months	1, 333 83	566 43	426 17	30 46	310 77

Charges & expenses—Continued.

			General average.		Special charges on freight.	Owners.
			¼ off.	Net.		
	Allowances for extra labor on cargo in consequence of a discharge of a portion of it into lighters while the ship was ashore, and of the landing of that portion under general order, which was rendered necessary by the condition of it as it arrived in the lighters:					
304 16	Robert & Co., ac. J. L. Phipps & Co., for charges on A◇M G 216 bales gunny bags: A◇P G 200 " " "					
	Storage 1 month, *a* 32c	133 12				
	Labor	133 12		100		
	" selecting & lotting for auction	133 12				
	" discharging 388 bales from sch'r	97		97		
	Reballing 224 bales, *a* 60c	170 40				
	1,238 lbs. rope, " 10c	123 80				
	36 lbs. twine, " 36c	12 96		107 16		
		803 52				
44, 251 39	Carried forward		18, 662 90	14, 345 72	1, 003 52	10, 239 25
44, 251 39	112, 113 Brought forward		18, 662 90	14, 345 72	1, 003 52	10, 239 25
	Robert & Co., ac. Fowler & Crampton, for charges on F. F. C. 282 bales gunny cloth:					
219 12	Storage 1½ months, 48c	203 04				
	Labor, *a* 48c	135 36	100			
	Extra do., selecting & assorting for auction, *a* 48c	135 36				
	Discharging from schooners 144 bales, " 48c	69 12		69 12		
	Reballing 95 bales, at 60c	57				
	860 lbs. rope " 10c	86		50		
	10 " twine " 36c	3 60				
		689 48				
	Robert & Co., ac. H. W. Hubbell, for charges on 244 bales jute:					
26 40	Storage 1½ mo's *a* 8c	29 28				
	Labor	19 52		20		
	Extra do., selecting, &c	19 52				
	Do. discharging from sch'r 32 bales, *a* 20c	6 40		6 40		
	Cartage public store	1 50				
		76 22				

		Cartage public store	6 40		6 40		
			1 50				
			76 22				
700		Robert & Co., ac. Fowler & Crampton, for charges on 9,708 bags linseed: Storage 1¼ mo's at 4c	582 48				
		Forward	582 48				
45,196 91		Carried forward		18,662 90	14,591 24	1,003 52	10,239 75
45,196 91	114, 115	Brought forward		18,662 90	15,591 24	1,003 52	10,239 25
		Robert & Co. ac. Fowler & Crampton—cont'd:					
		Brought forward	582 48				
		Labor, a 6c	582 48		400		
		Extra labor " 6c	582 48				
		Labor, sewing, picking up, sweeping, & discharging from sch'rs	968 40		200		
		Bags furnished, 1,700, a 25c	425		100		
		For charges on 1,700 bags linseed sweepings:					
		Storage 1 mo., at 2c	34				
		Labor " 3c	51				
			3,225 84				
		Robert & Co. ac. Mimzinger & Pitzipio, for extra labor on 2,000 bags linseed	411 50				
150		Allowed in general average, (in propertion to actual payments on other similar shipments)			150		
		Robert & Co. ac. Weston & Gray, for charges on G. (B. S.) C., 210 bales gunny cloth:					
239 20		Storage 1¼ mo's, a 48c	151 20		50		
		Labor, receiving and delivering, at 48c	100 80		50 40		
		Extra labor, selecting & arranging for auction	100 80				
		Rebailing 90 bales, a 60c	54		138 80		
		840 lbs. rope, a 10c	84				
45,586 11		Carried forward	490 80	18,662 90	15,680 44	1,003 52	10,239 25
45,586 11	116, 117	Brought forward		18,662 90	15,680 44	1,003 52	10,239 25
		Robert & Co. ac. Weston & Gray—continued:					
		Brought forward	490 80				
		Cartage 1 bale from public store	1 50				
			492 30				
		Robert & Co. ac. J. R. Busk:					
43 25		For extra labor in gunny cloth, ac. J. R. Busk	93 25		43 25		
		Weston & Gray:					
128 53		For 4 1-6 bales gunny short, delivered 50 peices, 1,500 y'ds, a 3c., average price of damaged	195				
		Credit:					
		Duty on invoice, w'g't 324 lbs., at 3c	97 23				
		Less allowed for damage	48 62				
		Gold	$48 61 a 36¼%	66 47			
				128 53	128 53		

Charges & expenses—Continued.

			General average.		Special charges on freight.	Owners.
			½ off.	Net.		
	Allowances for extra labor on cargo in consequence of a discharge of a portion of it into lighters while the ship was ashore, and of the landing of that portion under general order, which was rendered necessary by the condition of it as it arrived in the lighters:					
304 16	Robert & Co., ac. J. L. Phipps & Co., for charges on A M G 216 bales gunny bags: A P G 200 " " "					
	Storage 1 month, *a* 32c	133 12				
	Labor	133 12		100		
	" selecting & lotting for auction	133 12				
	" discharging 388 bales from sch'r	97		97		
	Rebailing 284 bales, *a* 60c	170 40				
	1,238 lbs. rope, " 10c	123 80				
	36 lbs. twine, " 30c	12 96		107 16		
		803 52				
44,251 39	Carried forward		18,662 90	14,345 72	1,003 52	10,239 25
44,251 39	112,113 Brought forward		18,662 90	14,345 72	1,003 52	10,239 25
	Robert & Co., ac. Fowler & Crampton, for charges on F. F. C. 282 bales gunny cloth:					
219 12	Storage 1½ months, 48c	203 04				
	Labor, *a* 48c	135 36	100			
	Extra do., selecting & assorting for auction, *a* 48c	135 36				
	Discharging from schooners 144 bales, " 48c	69 12		69 12		
	Rebailing 95 bales, at 60c	57				
	860 lbs. rope " 10c	86		50		
	10 " twine " 30c	3 60				
		689 48				
	Robert & Co., ac. H. W. Hubbell, for charges on 244 bales jute:					
26 40	Storage 1½ mo's *a* 8c	29 28				
	Labor	19 52		20		
	Extra do., selecting, &c	19 52				
	Do. discharging from sch'r 39 bales, *a* 20c	6 40		6 40		
	Cartage public store	1 50				
		76 22				

		Cartage public store	6 40		6 40		
			1 50				
			76 22				
		Robert & Co., ac. Fowler & Crampton, for charges on 9,708 bags linseed:					
700		Storage 1½ mo's at 4c	582 48				
		Forward	582 48				
45,196 91		Carried forward		18,662 90	14,591 24	1,003 52	10,239 75
45,196 91	114, 115	Brought forward		18,662 90	15,591 24	1,003 52	10,239 25
		Robert & Co. ac. Fowler & Crampton—cont'd:					
		Brought forward	582 48				
		Labor, a 6c	582 48		400		
		Extra labor " 6c	582 48				
		Labor, sewing, picking up, sweeping, & discharging from sch'rs	968 40		200		
		Bags furnished, 1,700, a 25c	425		100		
		For charges on 1,700 bags linseed sweepings:					
		Storage 1 mo., at 2c	34				
		Labor " 3c	51				
			3,225 84				
		Robert & Co. ac. Mimzinger & Pitzipio, for extra labor on 2,000 bags linseed	411 50				
150		Allowed in general average, (in proportion to actual payments on other similar shipments)			150		
		Robert & Co. ac. Weston & Gray, for charges on G. (B. S.) C., 210 bales gunny cloth:					
239 20		Storage 1½ mo's, a 48c	151 20		50		
		Labor, receiving and delivering, at 48c	100 80		50 40		
		Extra labor, selecting & arranging for auction	100 80				
		Rebailing 90 bales, a 60c	54		138 80		
		840 lbs. rope, a 10c	84				
45,586 11		Carried forward	490 80	18,662 90	15,680 44	1,003 52	10,239 25
45,586 11	116, 117	Brought forward		18,662 90	15,680 44	1,003 52	10,239 25
		Robert & Co. ac. Weston & Gray—continued:					
		Brought forward	490 80				
		Cartage 1 bale from public store	1 50				
			492 30				
		Robert & Co. ac. J. R. Busk:					
43 25		For extra labor in gunny cloth, ac. J. R. Busk	93 25		43 25		
		Weston & Gray:					
128 53		For 4 1-6 bales gunny short, delivered 50 peices, 1,500 y'ds, a 3c., average price of damaged	195				
		Credit:					
		Duty on invoice, w'g't 324 lbs., at 3c	97 23				
		Less allowed for damage	48 62				
		Gold	$48 61 a 36⅓%	66 47			
				128 53	128 53		

Charges & expenses—Continued.

			General average.		Special charges on freight.	Owners.
			¼ off.	Net.		
	E. D. Morgan & Co., for 8 bales gunny short, delivered 250 bags each bale :					
154 40	2,000 bags, *a* 1,120 av. price	224				
	Less duty	102				
	Less return for damage	51				
	Gold	$51 at 136¼% 69 60				
		154 40		154 40		
45,912 29	Carried forward		18,662 90	16,006 62	1,003 22	10,239 25
45,912 29	118, 119 Brought forward		18,662 90	16,006 62	1,003 52	10,239 25
	Robert Mackie & W. W. Story :					
50	For valuation ship "Oneiza"	50		50		
	Robert Mackie :					
100	For service supervising & deciding upon claims for allowances in general average for damage to vessel & cargo	100		100		
	J. R. Busk :					
500	For agency services, attending to despatching assistance, recovering & delivering cargo landed from lighters, & many other services	500		500		
291 81	Wages & provisions of officers & crew, from 22 January, when the ship was run ashore, until 1st February, when she was got off and towed to New York, 11 days :					
	Captain £25 p'r mo.					
	1st mate 6 " "					
	2 " Boatswain, Cook £4 each, 12 " "					
	Forward 43					
	Carried forward		18,662 90	16,656 62	1,003 52	10,239 25
46,854 10	120, 121 Brought forward		18,662 90	16,656 62	1,003 52	10,239 25
46,854 10	Wages and provisions—continued :					
	Brought forward, [forward] £43					
	17 men, at £2 10 each 42 10					
	£85 10					
	At 4 84 per £ & gld *a* 136¼% $564 86 :					
	11 days, *a* 564 86 per month, is	307 11				

	Provisions:					
	Captain ..... $1 per day.					
	2 mates, a 50c. ea 1					
	19 men " 30c. " 5 70					
	11 days, a ..... $7 70 per day..	84 70				
		291 81		291 81		
15	For noting & extending protest & certified copy of same	15		15		
30	For drawing average bond and procuring signatures thereto	30		30		
	Johnson & Higgins:					
750	For sundry services in the case, for procuring contributory values, & for this adjustment	750		750		
47,649 10	.....	.....	18,662 90	17,743 43	1,003 52	10,239 25
47,649 10	122, 123 Brought forward	.....	18,662 90	17,743 43	1,003 52	10,239 25
	One-third off	.....	6,220 97	.....	.....	6,220 97
754 64	Commission for collecting general average, 2½%.....	754 64	.....	12,441 93 754 64	.....	.....
	General average	.....	.....	$30,940 00	.....	.....
	Special charges on freight	.....	.....	.....	$1,003 52	.....
48,403 74	Dollars. Owners	.....	.....	.....	.....	$16,460 22

124, 125 *Contributary interest and apportionment of general average.*

Vessel:				
Valued in her damaged condition	27,000			
Add amount made good	12,441 93	39,441 93	pays	9,685 81
Freight:				
Amount collected	21,185 43			
Gold at 136⅓%.....	28,918 10			
One-half is	14,459 05			
Less special charges	1,003 52	13,455 53	"	3,304 29
Cargo:				
Weston & Gray:				
G. [B. S.] S., 210 bales gunny cloth	3,225 96			
Add amount made good	367 73	3,593 69	"	882 50

Contributary interest and apportionment, &c.—Continued.

Cargo—Continued:					
Joseph R. Busk:					
H. M. S. J. C. H. M. J. C. C. 45 bales gunny cloth	469 46				
Add amount made good	43 25				
		512 71	pays		125 91
Mimzinger & Pitzipio:					
R 8 2,000 bags linseed					
53 " " sweepings	8,253 39				2,063 63
Add amount made good	150				
		8,403 39			
Carried forward		65,407 25			16,062 14
126, 127 Brought forward		65,407 25			16,052 14
H. W. Hubbell:					
244 bales jute	2,364 32				
Add amount made good	26 40				
		2,390 72	pays		587 10
F. R. & W. C. Fowler & Crampton:					
H. B. & Co., 9,994 bags linseed	43,377 41				
Add amount made good	700				
		44,077 41	"		10,824 14
2,280 bags saltpetre		2,131 74			523 50
F. F. C. 282 bales gunny cloth	3,658 61				
Add amount made good	219 12				
		3,877 73			952 26
J. L. Phipps & Co.:					
A P G 200 bales gunny bags	1,092 32				
216 " " "	1,555 19				
A M G	2,647 51				
Add amount made good	304 16				
		2,951 67			724 85
Hastings & Weed:					
100 rolls matting		2,598 75			638 17
E. D. Morgan & Co.:					
P. D. 195 bales gunny bags	2,402 24				
Add amount made good	154 40				
		2,556 64			627 84
At 24 5572-10000 per cent		$125,991 91			$30,940 00

	Dr.	Cr.	Balance to—	
			Pay.	Receive.
Weston & Gray:				
Pay proportion of general average	882 50			
Receive amount made good		367 73		
Balance to pay		514 77	514 77	
	882 50	882 50		
Joseph R. Busk:				
Pay proportion of general average	125 91			
Receive amount made good		43 25		
Balance to pay		82 66	82 66	
	125 91	125 91		
Munzinger & Pitzipio:				
Pay proportion of general average	2,063 63			
Receive amount made good		150		
Balance to pay		1,913 63	1,913 63	
	2,063 63	2,063 63		
H. W. Hubbell:				
Pay proportion of general average	587 10			
Receive amount made good		26 40		
Balance to pay		560 70	560 70	
	587 10	587 10		
J. R. & W. C. Fowler & Crampton:				
Pay proportion of general average	12,299 90			
Receive amount made good		919 12		
Balance to pay		11,380 78	11,380 78	
	12,299 90	12,299 90		
Carried forward			14,452 54	

Settlement—Continued.

	Dr.	Cr.	Balance to— Pay.	Balance to— Receive.
130, 131 Brought forward			14,459 54	
J. L. Phippe & Co:				
Pay proportion of general average	724 85			
Receive amount made good		304 16		
Balance to pay		420 69	420 69	
	724 85	724 85		
Hastings & Weed:				
Pay proportion of general average			638 17	
E. D. Morgan & Co.:				
Pay proportion of general average	627 84			
Receive amount made good		154 40		
Balance to pay		473 44	473 44	
	627 84	627 84		
Agents & owners of vessels:				
Receive disbursements		42,224 05		
" commissions, interest, wages, & provisions, &c.		3,419 63		
Pay general average on vessel	9,685 81			
" " " " freight	3,304 29			
" special charges on do.	1,093 52			
" owners' column	16,460 22			
Balance to receive	15,189 84			15,189 84
	45,643 68	45,643 68		
132, 133 Carried forward			15,984 84	
Brought forward			15,984 84	15,189 84
Johnson & Higgins:				
Receive their fees				795 00
			$15,984 84	15,984 84

NEW YORK, *July 20th*, 1867.

HENRY W. JOHNSON & A. F. HIGGINS, *Average Adjusters.*

134

135 Know all men by these presents that we, Walter R. Jones and Henry L. Scudder, are held and firmly bound unto William Rathbone, William Rathbone, junior, Samuel G. Rathbone, Thomas K. Twist, and William Lidderdale, in the sum of thirteen thousand dollars, lawful money of the United States of America, to be paid to the said William Rathbone, William Rathbone, junior, Samuel G. Rathbone, Thomas K. Twist, and William Lidderdale, their executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated the thirteenth day of April, one thousand eight hundred and sixty-nine.

Whereas judgment hath heretofore, on the sixth day of April, in the year one thousand eight hundred and sixty-nine, been rendered by the circuit court of the United States in a certain suit therein pending, wherein William Rathbone, William Rathbone, junior, Samuel G. Rathbone, Thomas K. Twist, and Lidderdale were plaintiffs, and

136 Frederick R. Fowler, William C. Fowler, and Mahlon B. Crampton were defendants, in favor of said plaintiffs, and against said defendants, for the sum of more than two thousand dollars, and the said defendants have prosecuted a writ of error to the Supreme Court of the United States to reverse the said judgment:

Now, therefore, the condition of this obligation is such, that if the above-named defendants shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

WALTER R. T. JONES. [L. S.]
HENRY J. SCUDDER. [L. S.]

Sealed and delivered in the presence of—
EDWARD L. OWEN.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Walter R. T. Jones, one of the subscriber to the foregoing bond, being sworn, says that he is a resident of the county of Queens, in the State of New York, and a freeholder within this State, and is worth the

137 sum of twenty-six thousand dollars over all his debts and liabilities and property exempt from execution.

WALTER R. T. JONES.

Sworn before me this 13th day of April, 1869.

EDWARD L. OWEN,
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Henry J. Scudder, one of the subscribers to the foregoing bond, being sworn, says that he is a resident of the city, county, and State of New York, and freeholder within this State, and is worth the sum of twenty-six thousand dollars over all his debts and liabilities and property exempt from execution.

HENRY J. SCUDDER.

Sworn before me this 13th day of April, 1869.

EDWARD L. OWEN,
U. S. Commissioner.

STATE OF NEW YORK,
Southern District of New York, ss:

On this 13th day of April, 1869, before me personally came Walter R. T. Jones & Henry J. Scudder, to me known to be the same in-
138 dividuals described in and who executed the foregoing bond, and severally acknowledged that they executed the same for the uses and purposes therein mentioned.

EDWARD L. OWEN,
U. S. Commissioner.

The foregoing bond is hereby approved as to its form and amount, and the sufficiency of the sureties.
April 13th, 1869.

SAM'L BLATCHFORD,
District Judge.

(Endorsed:) Walter R. T. Jones and Henry S. Scudder to William Rathbone, junior, and others. Indemnity bond. We approve of the within bond. Owen, Nash & Gray. Filed April 13, '69. Scudder & Carter, attorneys & counsellors, 66 Wall st., N. Y.

139 UNITED STATES OF AMERICA, *ss:*

To William Rathbone, William Rathbone, junior, Samuel G. Rathbone, Thomas K. Twist, and William Lidderdale, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to the writ of error filed in the clerk's office of the circuit court of the United States for the second circuit and the southern district of New York, wherein Frederick R. Fowler, William C. Fowler, and Mahlon B. Crampton are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Blatchford, district judge of the United States for the southern district of New York, and one of the justices of said circuit court, this thirteenth day of April, in the year of our Lord one thousand eight hundred and sixty-nine, and of the independence of the United States the ninety-third.

SAM'L BLATCHFORD,
District Judge.

140 STATE OF NEW YORK,
Southern District of New York, ss:

George A. Black, being duly sworn, deposes and says that, on the 13th day of April, 1869, at the city of New York, he served the within citation on Owen, Nash & Gray, the attorneys for the defendants in error, by showing the within citation, and delivering to and leaving a copy thereof with E. H. Owen, one of said attorneys.

GEO. A. BLACK.

Sworn to before me this 15th day of April, 1869.
R. E. STILWELL, *U. S. Com'r.*

(Endorsed:) U. S. circuit court, southern district of New York. Frederick R. Fowler et al., pl'ffs in error, vs. William Rathbone et al., def'ts in error. Citation. Filed Ap'l 15, '69. Scudder & Carter, atty's for pl'ffs in error.

141 In the Supreme Court of the United States.

FREDERICK R. FOWLER, WILLIAM C. FOWLER, and Mahlon B. Crampton, plaintiffs in error,
vs.
WILLIAM RATHBONE, WILLIAM RATHBONE, JR., Samuel G. Rathbone, Thomas K. Twist, and William Lidderdale, defendants in error.

Of December term, in the year one thousand eight hundred and sixty-nine.

Afterwards, to wit, on the ninth day of December, in this same term, before the Chief Justice and the associate justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come the said Frederick R. Fowler, William C. Fowler, and Mahlon B. Crampton, by James C. Carter, their attorney, and say that, in the record and proceedings aforesaid, also in giving the judgment aforesaid, there is manifest error in this, to wit, that by the record aforesaid it ap-
142 pears that the judgment aforesaid, in form aforesaid given, was given for the aforesaid William Rathbone, William Rathbone, jr., Samuel G. Rathbone, Thomas K. Twist, and William Lidderdale, defendants in error above-named, against the said Frederick R. Fowler, William C. Fowler, and Mahlon B. Crampton, plaintiffs in error above-named; whereas, by the law of the land, the said judgment ought to have been given for the said plaintiffs in error against the said defendants in error. And the said plaintiffs in error pray that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing; and that they may be restored to all things which they have lost by occasion of the said judgment.

JAMES C. CARTER,
Att'y for Plaintiffs in Error, 66 Wall st., N. Y. City.

143 (Indorsed:) 345. U. S. Supreme Court. Frederick R. Fowler et al., pl'ffs in error, vs. William Rathbone et al. def'ts in error. Assignment of errors. James C. Carter, att'y for pl'ffs in error. Filed 10 Dec., 1869.

144 Supreme Court of the United States.

WILLIAM RATHBONE, WILLIAM RATHBONE, JR., Samuel G. Rathbone, Thomas K. Twist, and William Lidderdale, def'ts in error,
ads.
FREDERICK R. FOWLER, WILLIAM C. FOWLER, and Mahlon B. Crampton, pl't'ffs in error

In error.

And afterwards, to wit, on the first Monday of December, in December term, in the year one thousand eight hundred and sixty-nine, the said William Rathbone, William Rathbone, jr., Samuel G. Rathbone, Thomas K. Twist, and William Lidderdale, by Owen, Nash & Gray, their attorneys, freely come here into court and say that there is no error either in the record and proceedings aforesaid, or in the giving of the judgment aforesaid, and they pray that the said Supreme Court of judicature, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid

above assigned in error; and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

OWEN, NASH & GRAY,
Attorneys for Def'ts in Error.

145 (Indorsed:) No. 345. Supreme Court of the United States. William Rathbone et al. ads Frederick R. Fowler et al. Joinder in error. Owen, Nash & Gray, atty's for def'ts in error, 71 Wall st., N. York. Filed 11 December, 1869.

(Indorsement on cover:) No. 345. Frederick R. Fowler, W'm C. Fowler, and Mahlon B. Crampton, plaintiffs in error, vs. William Rathbone, W'm R. Rathbone, jr., S. G. Rathbone, Thomas K. Twist, and William Lidderdale. S. New York C. C. U. S.
Filed 10th December, 1869.

SUPREME COURT OF THE UNITED STATES.

No. 141.

FREDERICK R. FOWLER, WILLIAM C. FOWLER, AND MAHLON B. CRAMPTON, PLAINTIFFS IN ERROR,

vs.

WILLIAM RATHBONE, WILLIAM RATHBONE, JR., S. G. RATHBONE, THOMAS K. TWIST, AND WILLIAM LINDERDALE.

Addition to record.

1 UNITED STATES OF AMERICA,
Southern District of New York, ss:

[SEAL.] I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, do hereby certify that the writings attached to this certificate are true copies of their respective originals on file and remaining of record in my office.

And I further certify that, pursuant to the directions of the said order whereof a copy is attached hereto, I have amended the record in the action in said order named, wherein William Rathbone and others are plaintiffs, and Frederick R. Fowler and others are defendants, by inserting after the words "the testimony on both sides was here closed," in the bill of exceptions, these words "and all the evidence given upon the trial is contained in this bill of exceptions." And also by inserting in said bill of exceptions, at the close of the first exception to the charge of the judge, after the words "common peril," these
2 words: "and no evidence that the peril to the ship was increased by running her on the flats."

And in pursuance of said order I certify these amendments to the end that the transcript of the record sent to the supreme court pursuant to the writ of error, be in like manner amended.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 16th day of February, in the year of our Lord one thousand eight hundred and seventy-one, and of the independence of the said United States the ninety-fifth.

KENNETH G. WHITE, *Clerk.*

[5-cent stamp.]

At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held
3 at the United States court-rooms, in the city of New York, on Saturday, the tenth day of February, in the year of our Lord one thousand eight hundred and seventy-one:

Present, the Honorable Samuel Blatchford, dist. judge.

FREDERICK R. FOWLER & AL. *ads.* WILLIAM RATHBONE & AL.

On reading and filing the consent of Owen, Nash, and Gray, attorneys for the plaintiffs, and of Scudder & Carter, attorneys for the defendants—

On motion of Scudder & Carter, defendant's attorneys, it is ordered that the record in this action be amended by inserting after the words "the testimony on both sides was here closed" in the bill of exceptions, these words "and all the evidence given upon the trial is contained in this bill of exceptions." And also by inserting in said bill of exceptions, at the close of the first exception to the charge of the
4 judge, after the words "common peril," these words, "and no evidence that the peril to the ship was increased by running her on the flats."

And it is further ordered that the amendments hereby ordered be certified by the clerk of this court, to the end that the transcript of the record sent to the supreme court, pursuant to the writ of error, be in like manner amended.

SAM'L BLATCHFORD.

Filed 18 February, 1871.

(Indorsed:) Supreme Court U. S., 1870, Dec. term. No. 141. Frederick R. Fowler et al., pl'ffs in error, vs. William Rathbone et al. Order amending record. Filed 18 Feb'y, 1871.

U. S. SUPREME COURT.

FREDERICK R. FOWLER ET AL.,
PLAINTIFFS IN ERROR,

vs.

WILLIAM RATHBONE ET AL.

BRIEF OF PLAINTIFFS IN ERROR.

JAMES C. CARTER,
Of Counsel for Plaintiffs.

New York:
E. WELLS SACKETT, BOOK, JOB AND LAW PRINTER.
COR. WILLIAM AND PINE STREETS.
1871.

E. Wells Sackett, Law Printer, cor. William & Pine Sts.

U. S. Supreme Court.

Frederick R. Fowler *et al.*,
Plaintiffs in Error,

vs.

William Rathbone *et al.*

PRELIMINARY STATEMENT.

The action was *assumpsit* by the defendants in error, who were the owners of the ship "*Oneiza*," to recover from the plaintiffs in error, who were the consignees and owners of cargo on board, a sum alleged to be due, by way of a general average contribution, for losses and expenses suffered and incurred in consequence of an alleged voluntary stranding of the ship.

The defence consisted of a denial of the alleged voluntary stranding, and of the correctness both in point of principle and detail of the adjustment of the loss upon which the plaintiffs in the Court below relied.

The action was brought on for trial in the first instance before Mr. Justice Nelson and a jury; and no conflict appearing in the evidence, a formal verdict was taken by

consent for the plaintiffs in the Court below, subject, however, to the opinion of the Court upon a *case* to be made, and subject to adjustment as to the amount to be recovered upon principles to be declared, with leave to either party to turn the *case* into a bill of exceptions.

The effect of this mode of procedure was, of course, to reserve all the questions for argument before the Court. The *case* as prepared for argument set forth the evidence which was given at the trial, and thus permitted the Court to draw such inferences of fact as a jury would have been warranted in drawing. But the material facts were so well presented by the evidence, that although some of the questions arising for discussion were, speaking strictly, questions of fact rather than of doctrine, they became *substantially* questions of law.

The case thus made was argued before Mr. Justice Blatchford, who held that there had been a *voluntary* stranding of the ship, and sustained the principles upon which the adjustment had been made.

The *case* was thereupon turned into a bill of exceptions, pursuant to the leave reserved in it, and the record brought to this Court by a writ of error. Of course, in framing the bill of exceptions, it became necessary to separate the strict questions of law from those which were *in form* questions of fact, and to represent the former as having been decided by the Judge in a charge to a jury, and the latter to have been passed upon by the jury.

The material and undisputed facts are as follows:

The ship "*Oneiza*," bound on a voyage from Calcutta to New York, with a large and valuable cargo consisting of linseed, gunny-cloth, &c., arrived inside of Sandy Hook and there anchored on the 16th of January, 1867. She remained there until the 21st of January unable to proceed on account of being surrounded by ice, and be-

came badly cut around the bows in consequence of the ice drifting against her. On the 21st she took a couple of steam-tugs and was towed up through the Narrows into the harbor of New York, and at 7 P. M. came to anchor near the Quarantine ground, abreast of Staten Island, in ten fathoms of water, and remained there at anchor during the night. At this time she was making no more water than usual.

See Protest, fol. 39.
" Preface to Statement of Average, fol. 58.
" Testimony of Merritt, fols. 24 to 27.

On the following morning, at half-past seven o'clock, *she was observed to be sinking;* and upon sounding the pumps *six feet of water were found in her* (Record, fols. 40 and 58).

Efforts were made, but found unavailing, to keep the water down by means of the pumps; and it appearing that sinking was inevitable, and the Staten Island flats being at hand, where there was much less water, it was decided to put her upon those; and, with the assistance of the tugs, which were still alongside, this was done, and she took ground upon the flats at 8 o'clock, A. M., having then *ten feet of water* in the hold. The tide was still making flood and at high-water she had twenty feet in her.

The assistance of wrecking-schooners and apparatus was at once procured, when it was found that her port on her port-bow had been cut or stove in under water by the ice, and holes cut through her starboard-bow also.

She was pumped out, part of her cargo discharged into lighters, and she with the residue of it towed to New York. The whole cargo was delivered, of course, in a very damaged condition, but the whole freight was collected.

The place where the ship lay at anchor when she was discovered to be sinking was about 300 yards from the place on the flats she was run upon. At the latter place there was about 22 feet of water at half-tide. At the former it was much deeper. *The bottom in both places was the same, soft.* She encountered *no new peril* in going upon the flats. She could have been raised had she sunk at her anchors. The only difference would have been in the expense. It would have cost in the latter case, perhaps, $30,000; whereas the actual expense of raising her from the flats was but something over $12,000.

See Merritt's testimony, fols. 24 to 27.

The ship was found to be damaged in the following respects.

1st. Her sheathing and planking about the bows stripped off and holes cut through her bows. These injuries were plainly attributable to the direct action of the ice.

2d. The beams of the upper and lower decks were strained or forced upwards, and the iron straps securing the stanchions to the beams parted. This injury was clearly attributable to the swelling of the linseed in consequence of being soaked with water.

3d. The fastenings of the knees, decks and waterways were strained; some of the knees of the stanchions broken, and some of the kelson bolts started and strained. These injuries would seem also to be sufficiently accounted for by the swelling of the linseed; and this was the only cause *proved*. The average adjusters and those who aided them in making the adjustment, attributed them to this cause and also to the ship's lying upon an *uneven bottom;* but this latter cause was a *pure conjecture* on their part; there was no evidence whatever to show that the bottom was uneven. On the contrary, it

was shown to be the same as where she lay at anchor and a *soft bottom*.

See Survey, fols. 30, 31.
" Testimony of Westervelt & Story, fols. 28, 29.
" Testimony of Merritt, fol. 26.

The damage to the cargo by the water was very great, that belonging to the plaintiffs in error having sustained a loss of more than $146,000 on a sound value of $196,000 (fol. 34).

The average adjustment, of cause, ment, presents an extraordinary result. upon the theory that there had been a *voluntary stranding* of the ship; and that therefore all the damage to the ship which was occasioned by the lying on the bottom was to be contributed for by the other interests. There was *no proof* that *any particular item* of damage was occasioned by her lying on the bottom; and on the other hand, the palpable traces of the action of the ice, and the tremendous strain of the swollen cargo manifested by the forcing upwards of the ship's beams and the parting of the iron straps which secured the beams to the stanchions, seem to point with distinctness to these two *proved* causes as the sources of the great bulk of the damage to the ship; and it was conceded that all loss proceeding from *these* causes was *particular* and not *general* average. And yet of the sum of about $19,000 which it cost to repair the vessel, only a fraction over $2,000 is regarded as attributable to these causes, and more than $17,000 of the expense is treated as having been made necessary by the injuries received from lying on the bottom; and to give a color of defence to this distribution of the charges it is assumed, *without proof*, and indeed *against the proof*, that the bottom where the ship lay was *uneven!*

It would seem that the adjusters had, in this respect, adopted the reverse of the established rule, and had *as-*

The place where the ship lay at anchor when she was discovered to be sinking was about 300 yards from the place on the flats she was run upon. At the latter place there was about 22 feet of water at half-tide. At the former it was much deeper. *The bottom in both places was the same, soft.* She encountered *no new peril* in going upon the flats. She could have been raised had she sunk at her anchors. The only difference would have been in the expense. It would have cost in the latter case, perhaps, $30,000; whereas the actual expense of raising her from the flats was but something over $12,000.

See Merritt's testimony, fols. 24 to 27.

The ship was found to be damaged in the following respects.

1st. Her sheathing and planking about the bows stripped off and holes cut through her bows. These injuries were plainly attributable to the direct action of the ice.

2d. The beams of the upper and lower decks were strained or forced upwards, and the iron straps securing the stanchions to the beams parted. This injury was clearly attributable to the swelling of the linseed in consequence of being soaked with water.

3d. The fastenings of the knees, decks and waterways were strained; some of the knees of the stanchions broken, and some of the kelson bolts started and strained. These injuries would seem also to be sufficiently accounted for by the swelling of the linseed; and this was the only cause *proved*. The average adjusters and those who aided them in making the adjustment, attributed them to this cause and also to the ship's lying upon an *uneven bottom;* but this latter cause was a *pure conjecture* on their part; there was no evidence whatever to show that the bottom was uneven. On the contrary, it

was shown to be the same as where she lay at anchor and a *soft bottom*.

See Survey, fols. 30, 31.
" Testimony of Westervelt & Story, fols. 28, 29.
" Testimony of Merritt, fol. 26.

The damage to the cargo by the water was very great, that belonging to the plaintiffs in error having sustained a loss of more than $146,000 on a sound value of $196,000 (fol. 34).

The average adjustment, of ~~cause, or~~ *ex parte* statement, presents an extraordinary result. It was made up upon the theory that there had been a *voluntary stranding* of the ship; and that therefore all the damage to the ship which was occasioned by the lying on the bottom was to be contributed for by the other interests. There was *no proof* that *any particular item* of damage was occasioned by her lying on the bottom; and on the other hand, the palpable traces of the action of the ice, and the tremendous strain of the swollen cargo manifested by the forcing upwards of the ship's beams and the parting of the iron straps which secured the beams to the stanchions, seem to point with distinctness to these two *proved* causes as the sources of the great bulk of the damage to the ship; and it was conceded that all loss proceeding from *these* causes was *particular* and not *general* average. And yet of the sum of about $19,000 which it cost to repair the vessel, only a fraction over $2,000 is regarded as attributable to these causes, and more than $17,000 of the expense is treated as having been made necessary by the injuries received from lying on the bottom; and to give a color of defence to this distribution of the charges it is assumed, *without proof*, and indeed *against the proof*, that the bottom where the ship lay was *uneven!*

It would seem that the adjusters had, in this respect, adopted the reverse of the established rule, and had *as-*

sumed that all damage to the ship should be carried to the account of *general* average, which could not be traced to a *particular* average cause.

But when they came to the damage to the *cargo* they applied the contrary rule with great rigidity; and although it was proved that more than ten of the 20 feet of water which the ship took in came in *after she took bottom* on the flats, nevertheless, as it could not be proved that any of this water came in through leaks occasioned by the great injuries which they themselves regarded the ship as having received from the stranding, they held that the damage to the cargo was occasioned by the water which came in through the holes in the bows alone, and was therefore a particular average upon the cargo to which the ship and freight were not bound to contribute (fol. 23).

POINTS.

I. There can be no dispute as to the following principal facts:

First. At the time the determination was taken to put the ship on the flats, she was not simply *exposed* to a *peril* which seemed *inevitable*, but the stroke had *already fallen* upon her. She was already smitten with a *death-blow* proceeding *directly* from the action of the elements. She was not simply *in danger* of sinking, but she *was actually sinking* from the *direct* effect of the *accidental* injury, and there was no power to save her from it.

See Master's Protest, pp. 14, 15 and 16.

See Average Bond, p. 7.

Second. She *continued sinking* all the time after she started for the flats until she took the bottom upon them, having *six* feet of water in her when she started, and *ten* when she struck the flats.

See same documents.

Third. She did not *expect* to encounter, and did not *in fact* encounter, *any new peril* in going upon the flats. She was sinking to the bottom when she started; she *expected* to sink and *did* sink upon the flats. The character of the bottom was the *same* in both places.

Merritt's Testimony, fol. 26.

Fourth. It was certain that expense would be saved both for the ship and cargo if she could reach shallower water before sinking. No endeavor need be made to rob the master of the credit of the motive of acting for the common benefit; but the predominating and resistless motive of *self-preservation* was present, and he went upon the flats as naturally as a man who has fallen overboard strikes for shoal water.

Fifth. It is true that by *voluntary* agency the position of the vessel while she was sinking was *changed*, and that she took the bottom at a *different place* from that to which the direct action of the elements would have carried her, and that this change was a *common benefit* to all the imperilled interests.

II. The law of general average runs a sharp and clear line of division between all such losses as are *in-*

voluntary, that is to say, caused by the resistless force of the elements, and therefore *against the will of man*, and such as are *voluntary*, or caused *by* the will of man. The former class must be borne by the subject upon which they fall as a *particular average*. The latter *may, or may not*, be imposed as a general average upon all the interests, according as they *comply, or fail to comply* with certain other essential conditions. Touching the doctrine declared in this point, all the authorities are at one.

III. The adjustment upon which the plaintiffs in the Court below stood, was made up upon the theory that the damage to the ship was produced in *three* different ways.

First. By the action of the ice in cutting holes through the bows and tearing away the sheathing and planking from that part of the ship. This loss was conceded to be a particular average.

Second. The forcing up of the deck-beams, breaking of fastenings, knees, &c., and straining produced by the swelling of the linseed after it was soaked by the water. The adjusters proceeding upon the view that the water was all taken in through the holes in the bows, professed to regard this as a particular average loss also, but at the same time attributed a very small part of the damage to this cause.

Record, fol. 29.

Third. Straining of the vessel, starting of bolts, &c., produced by the ship's lying upon the bottom.

IV. It follows from the above that the submersion or stranding (by whichever term it may be called) of the ship at the *particular and precise spot* where she was submerged or stranded, was produced by the *direct action* of two *concurring causes*, namely, *the perils of the seas* and the *voluntary act* of the master; one of which causes each particular interest was bound to take the burden of according as it happened to fall; and the other of which *might*, under certain circumstances, be imposed as a common burden upon *all* the interests. The problem is, to *which* of these *two concurring* causes the sinking or stranding is to be attributed.

1. We say *direct action* of two concurring causes; for the ship *was sinking at the time* the master decided to run her toward the flats, and *had been sinking* for some time *prior thereto*, and *continued to sink* until she touched the bottom, *directly in consequence* of the water taken in through the holes in the bows. This is shown by the fact that she had six feet of water in her when the master came to his decision, and ten feet when she touched the flats.

   Record, fol. 40.

2. It is only by introducing into the above point the words "at the particular and precise spot where she was submerged or stranded," that we are able to give the defendants in error the benefit of the concession that the voluntary act of the master was *in any sense a cause* of the stranding; for it seems sufficiently certain that the ship must speedily have touched bottom at her anchorage if she had not been moved from it.

3. Giving this prominence to the particular spot, we may say with truth that the ship would

not have taken bottom *where she did, but for* the water taken through the holes in her bows, nor *but for* the voluntary act of the master in running her toward the flats.

V. A general solution of the problem thus raised can easily be stated without drawing in question any doctrine at any time declared by any of the jurists who have leaned most strongly in favor of a general contribution, where a ship has been stranded wholly or partly by some voluntary act.

If the actual sinking or stranding of the ship "Oneiza" was, under the particular circumstances, *the direct result of voluntary* agency *rather than of the action of the elements*, and was *other* and *different* from the one impending at the time the voluntary resolution was taken, the case is one for general average. But if it was *substantially* the *same* stranding as the one impending, and modified by the voluntary act only in some incidental and immaterial respects, then it is a case for particular average.

Phillips on Insurance, § 1313.

1. This is but applying the same form of solution as is applied to the very analogous case where a loss is produced by *two concurring causes*, for one of which one party, and for the other of which another party is responsible. It is simply ascertaining which is the *predominating* and *principal* cause of the loss.

   Phillips on Insurance, §§ 1132 to 1136.
   Parsons on Ins., vol. 2, p. 620.

2. The question thus stated is undoubtedly, *in its nature*, one of *fact*, and not of *doctrine;* but where, as in the present case, there is *no dispute* about the facts, the question becomes

practically one of law. When from uncontradicted evidence there is but *one* inference which can properly be drawn, the Court is to draw that inference.

Chandler *v.* Von Rœder, 24 How., 224.

3. The elaborate discussions in the leading cases upon voluntary stranding are in fact, though not thus shaped *in form*, but discussions of the question whether the strandings in each case were *substantially the same* as would inevitably have happened by the action of the elements. The decisions in the following cases were in effect that the strandings were not substantially the *same*, but *different*, and that the respects in which they differed were such as to give to the losses the character of general average.

Sims *v.* Gurney, 4 Binn., 513.
Barnard *v.* Adams, 10 How., 270.

4. That the general solution above set forth is the true one hardly requires argument. If it be *not* true, then one of two other things is true, either of which is absurd.

First. That where a stranding or submersion is the result of the direct action of the elements *concurring* with human agency, there is nothing but *caprice* to determine whether the loss should be *general* or *particular* average.

Second. In all cases where human agency concurs *in any degree, however slight*, with the action of the elements to produce a stranding or submersion, the loss is *thereby* made general average.

5. And this also must be then true, that when a stranding or submersion is impending from the direct *action* of the elements, the question whether the loss shall be *general* or *particular* average, that is to say, the question *who shall bear the loss*, depends *not upon the facts of the case*, but *upon the will* of the master; for there can hardly be a case of an impending stranding or submersion in which the master may not, by voluntary action, shape the catastrophe in some degree.

VI. The actual sinking or stranding of the "Oneiza" *was substantially the same* sinking or stranding which was in progress under the *direct* action of the elements at the time of the voluntary resolution to run her upon the flats. It was therefore an *accidental* and not a *voluntary* sinking or stranding. All that the act of man accomplished was to *mitigate* and *abridge* some of the disastrous results of a death-blow already received.

1. The ship had received her death wound from the *direct action of the ice*, and was actually *on her way to the bottom* at the time the resolution was taken to run her upon the flats. Everything that followed the cutting through of her bows by the ice was the *immediate consequence* of that *accidental* disaster.

2. All that *could be done* was to employ the time she should occupy in sinking to the best advantage. All that *was done* was to move her while she was sinking, a space of some three hundred yards.

3. In this operation she was exposed to *no new peril* whatever. The place where she finally rested was neither better nor worse, as to the character of the bottom, than where she lay at anchor.

4. It was the master's *duty*, in the plainest and clearest sense of the term, to do the very thing he did.

5. The powerful and predominating motive of self-preservation would have permitted the master to take no other course.

6. It is respectfully submitted that the distinctions are decisive between the case at bar and those which have heretofore, after much controversy, been held to be cases for a general contribution, where a vessel staunch and strong, and capable of contending with the winds and waves, as yet unsmitten by any death-blow from an *accidental* peril, finds herself upon a lee shore and in apparently *inevitable* danger of being cast upon it; but still with a chance of escape, desperate though it be, and which concludes to abandon this chance, and seek the most favorable spot upon which to strand herself.

   (*a.*) In the cases referred to the peril which was impending, however inevitable it might seem, *had not in fact arrived.* The blow *had not struck* the ship. There was no *accidental cause* from the *actual operation* of which the injuries were received. True, they seemed *inevitable;* but that they were *absolutely certain*, could not be affirmed. There was nothing, therefore, to the *direct action* of which the damage could be with certainty

attributed but the *voluntary act*. But in the case at bar there was an *accidental* cause in *direct*, *present*, activity, to which the disaster was attributable.

(*b.*) The *ordinary duty* of the ship-owner, represented by the master, is to *navigate* the ship; not to run her ashore. It is to *prosecute* the adventure, not to put a premature end to it. A claim for a general contribution cannot be founded upon any act of the master *in the course of this ordinary duty*. Shippers of goods have the *right* to all this. It is in the bargain and they pay for it. The presence of an overwhelming peril may may make it best for the interests of all, treated as a unit, to depart from mere *navigation*, and strand the ship. This is something beyond what any one of the interests has the right to *require* of the ship, and is therefore outside of the *ordinary duty* of the master. The true foundation of the doctrine of a general contribution in cases of voluntary stranding lies in these considerations. But when, as in the case at bar, the actual operation of an *accidental* cause, *has*, of itself, already put an end to the business of *navigating* the ship, *all* the master's *ordinary duties* are not at an end. It is still his duty to do all in his power to *save* what he may of the interests confided to his charge; and will it be pretended that when his ship is sinking, and it is in his power to *mitigate* the consequences of such sinking by working his ship into shallower water, it is not his *duty* to do so?

(c.) It is readily conceded that if, in the performance of this duty, he sacrifices some one of the interests for the common benefit, there is still a valid claim for a general contribution to the extent of such sacrifice; but the fact of such sacrifice must be made out by *proof*, and is not to be *assumed* upon *conjecture*. Whoever seeks to compel another to share burdens which have fallen upon *him* must show *affirmatively* sufficient grounds for it.

VII. If the argument thus far has any solid foundation, the charge of the learned Judge in the Court below to the jury was wholly erroneous. It was based upon a direct denial of the position taken in the ~~Sixth~~ Fifth preceding point.

See Fourth Request, fol. 47.
" Charge, fol. 50.

1. Conceding, for the moment, and for the sake of the argument, that there was *some* evidence to go to the Jury upon the point whether the actual submersion was *different* from the one impending in consequence of the injuries from the ice, the learned Judge did not submit, but refused to submit *that question* to the jury; and *that issue* therefore, which is the material one in the case, *has never been tried*.

2. The learned Judge made the question of liability for a general contribution turn *entirely* upon these three points.

First. Whether the master ran the ship upon the flats *for the purpose* of diminishing the damages and expenses of raising and saving ship and cargo?

Second. Whether in so doing the peril to the ship was *increased?*

Third. Whether *by* so doing the damages and expenses of saving and raising the ship and cargo were diminished?

3. This was a total failure to present the true question. These three inquiries might each be answered in the affirmative, and yet the *actual stranding or submersion* be only an *unsubstantial*, *inconsiderable* and *immaterial modification* of the stranding or submersion *originally impending.*

(*a.*) If the *merest trifle only* of an increase of peril to the ship had been proved, it would have been enough to satisfy the requirement of the learned Judge, and would have obliged the jury to find a verdict supporting the claim for the general contribution.

(*b.*) The point was distinctly made by the request to charge that the grounds of difference between the actual and the impending disaster should be *substantial;* but this element was wholly ignored by the learned Judge.

(*c.*) The error thus committed was precisely this, that if a loss has been occasioned by the action of *two concurring causes*, one of which is a *particular average* cause, and the other of which is a *general*

average cause, the loss is to be taken as a *general average*, without any inquiry as to the respective degrees of efficiency with which these two causes may have operated, it being enough if the general average cause contributed *in any degree* to the loss. It is impossible to vindicate any such proposition.

4. The true way to submit the question to the jury was to have directed them to inquire and determine whether the actual stranding was substantially the *same* as the one *impending*, or only an inconsiderable modification of it; and it would have been proper enough to tell the jury that in determining this main question they should inquire whether the motive of the master's voluntary action was to save the interests of all concerned, and whether he thereby *substantially* increased the peril to the ship, and *substantially* diminished the expense of raising, &c. But these subordinate considerations, which properly enter into the determination of the principal question, *are not the principal question itself*.

VIII. But even if the proposition itself of the learned Judge had been sound, as a general principle of law, it was error to submit it to the jury. There *was no evidence in the case* warranting the submission of such a proposition to the jury.

1. The learned Judge himself recognized the necessity of the condition *that the peril to the ship should have been increased by the mas-*

ter's voluntary action. He made that a turning point with the jury. But there was not only no evidence of such increase of peril, but the contrary was distinctly proved by the plaintiffs' own witnesses.

(*a.*) The only sugestion of any increase of peril was the claim by the plaintiffs below that the *bottom* where the ship actually took the ground was *different* from the bottom where she lay at anchor, it being *uneven* in the former place. But the only evidence of this is the conjecture of the witnesses Westervelt, Story and Mackie, neither of whom had seen or knew anything about the locality of the disaster.

Record, fols. 28, 29, 32.

(*b.*) The protest makes no mention of this pretended *uneven bottom;* the survey makes no mention of it; and the master-wrecker who did know what the bottom was, expressly testified that it was *the same in both places.*

Record, fols. 26, 30 to 32, 37 to 43.

(*c.*) The lying upon a bottom of any sort and the swelling of the cargo were abundantly sufficient to account for all the injuries to the vessel, except that produced by the ice; by what rule of law or logic are we taught that we are at liberty to *assume* a cause for effects, when other causes sufficient to produce them are *proved* to be in operation?

(*d.*) Nay more; can we resort to conjecture to turn a *particular* into a *general* average,

when it is one of the first principles of the law of average that every loss is a particular average which cannot be traced to a general average cause? In order to save the ship from the burden of contributing for the loss to the cargo, the adjusters in this case invoked this principle and sought to defend themselves by it. When seeking to subject the cargo to the burden of the damage to the ship, they quietly ignore it.

Testimony of A. Foster Higgins, fol. 23.

2. It is not necessary to cite authorities to show that the submission of a case to the jury upon a proposition of law which assumes that there is a question of fact left in doubt by the evidence which is not so left in doubt, is error; and this, although the legal proposition were in itself sound.

IX. The defendants in error, in order to support their claim to the general contribution in dispute, may argue that there was a *possibility* that if the master and crew, instead of devoting themselves to the putting of the ship upon the flats, had employed all their efforts in endeavors to stop the holes in the bows with sails, &c., and in pumping, they *might* have kept the ship from sinking at her anchors; that this chance of safety was *voluntarily sacrificed*, and a new and different peril encountered. There are two observations to be made here which show that there is no escape for the defendants in error in this direction.

1. The charge of the learned Judge is not adapted to that view of the case at all; and if he had entertained that view, it would not have altered the general shape of the question which he should have submitted to the jury. There would still have been the *concurrence* of the two causes, one *accidental* and the other *voluntary*, in producing the loss, and the question whether the case was one of *general* or *particular* average could only have been solved by a square statement of, and answer to, the inquiry which of the two rival causes was the *predominating efficient one;* although, if it appeared that there really was some *valuable chance* of keeping the ship afloat at her anchors, the question would properly be resolved in favor of the general average. It can hardly be said that such valuable chance existed.

2. But this ground, if taken, is fatal to the details of the adjustment. If there was a *valuable chance* of keeping the vessel afloat at her anchors, there was the same *valuable chance* of saving the *cargo*, or a very large part of it, from submersion. It was not the six feet of water in the ship as she lay at her anchors, but the twenty feet which were in her as she lay on the flats, which caused the principal damage to the cargo. This chance of safety to the cargo was also thrown away by the voluntary act of the master, and for the consequent damage to the cargo the claim for a general contribution would be precisely as good, as that for the damage to the ship. The adjusters, however, have wholly excluded the cargo from the benefit of a contribution.

X. In passing from the discussion as to whether the claim for the general contribution is well founded, we observe that we find nothing in the adjudications of this Court which in any manner conflicts with any position herein taken. It is not material to consider whether there might not be found here and there an expression or *dictum* in the opinions of some of the learned Judges pronounced in reference to cases of widely different aspect from the one at bar, which, taken by itself, might not seem broad enough to favor the present claim.

1. A single remark of Mr. Justice Grier, in the case of Barnard *vs.* Adams, seems to call for notice. He observes that it is of more importance sometimes that some rule should be established, than what the particular rule should be. The observation is sound, but most inapplicable, it is respectfully submitted, to any of the leading rules of a system so scientific, so dependent everywhere upon the solid foundation of principle and reason, as the law of general average. No doctrine built upon erroneous principles can permanently stand in such a system.

2. The practice in Great Britain still makes injuries resulting from a voluntary stranding a particular average in all cases. The A[illegible] jurisprudence, more [illegible] principle and sound poli[illegible] cases of this description as po[illegible]ate meritorious elements, a gener[illegible]ution. But it would be a poor way [illegible]efend the American doctrine, which indeed requires no defence, to push the practice to an absurd extreme. Practical adjusters seem to entertain the view that the master of a vessel cannot perform *any* voluntary act in the way of mitigating the consequences of a disaster

1. The charge of the learned Judge is not adapted to that view of the case at all; and if he had entertained that view, it would not have altered the general shape of the question which he should have submitted to the jury. There would still have been the *concurrence* of the two causes, one *accidental* and the other *voluntary*, in producing the loss, and the question whether the case was one of *general* or *particular* average could only have been solved by a square statement of, and answer to, the inquiry which of the two rival causes was the *predominating efficient one;* although, if it appeared that there really was some *valuable chance* of keeping the ship afloat at her anchors, the question would properly be resolved in favor of the general average. It can hardly be said that such valuable chance existed.

2. But this ground, if taken, is fatal to the details of the adjustment. If there was a *valuable chance* of keeping the vessel afloat at her anchors, there was the same *valuable chance* of saving the *cargo*, or a very large part of it, from submersion. It was not the six feet of water in the ship as she lay at her anchors, but the twenty feet which were in her as she lay on the flats, which caused the principal damage to the cargo. This chance of safety to the cargo was also thrown away by the voluntary act of the master, and for the consequent damage to the cargo the claim for a general contribution would be precisely as good, as that for the damage to the ship. The adjusters, however, have wholly excluded the cargo from the benefit of a contribution.

X. In passing from the discussion as to whether the claim for the general contribution is well founded, we observe that we find nothing in the adjudications of this Court which in any manner conflicts with any position herein taken. It is not material to consider whether there might not be found here and there an expression or *dictum* in the opinions of some of the learned Judges pronounced in reference to cases of widely different aspect from the one at bar, which, taken by itself, might not seem broad enough to favor the present claim.

1. A single remark of Mr. Justice Grier, in the case of Barnard *vs.* Adams, seems to call for notice. He observes that it is of more importance sometimes that some rule should be established, than what the particular rule should be. The observation is sound, but most inapplicable, it is respectfully submitted, to any of the leading rules of a system so scientific, so dependent everywhere upon the solid foundation of principle and reason, as the law of general average. No doctrine built upon erroneous principles can permanently stand in such a system.

2. The practice in Great Britain still makes injuries resulting from a voluntary stranding a particular average in all cases. The American jurisprudence, more ~~consonant~~ with both erroneous principle and sound policy, allows in such cases of this description as possess the requisite meritorious elements, a general contribution. But it would be a poor way to defend the American doctrine, which indeed requires no defence, to push the practice to an absurd extreme. Practical adjusters seem to entertain the view that the master of a vessel cannot perform *any* voluntary act in the way of mitigating the consequences of a disaster

without entitling his vessel to the privilege of subjecting the other interests to the burden of sharing his loss. It would be useful to all concerned in maritime adventures, were it declared and understood that this Court has not by any of its decisions upon the subject of voluntary stranding *changed* any of the principles upon which the law of general average rests.

XI. Passing to the second general question raised by the adjustment in the present case, and conceding, for the purpose of the argument, that the loss by the stranding was a proper subject for a general contribution, we maintain that it was a clear error on the part of the adjusters to attribute, as they did, the damage done to the vessel by the straining, opening of seams, &c., almost exclusively to the ship's lying *on an uneven bottom.*

1. It is claimed by the adjusters and by those who support the adjustment, that there were two causes in operation, either of which was sufficient to produce this effect of straining, opening of seams, &c. One was the swelling of the linseed composing the cargo, consequent upon its being wet. The other was the lying of the ship upon an uneven bottom. The damage from the first of these causes they pronounce to be *particular average;* that from the second, *general average.*

2. Now, of these two causes thus supposed to be in operation (and it is not pretended that there were any others), there is no proof whatever of the *existence* of but one, namely, the swel-

ling of the cargo. There is absolutely no evidence that the bottom was uneven. The adjusters and those whom they called to their aid simply *conjectured* that. The evidence is that the bottom was *soft*.

3. Now, the adjusters themselves have refused to make the ship and freight contribute to any part of the damage sustained by the cargo, on the ground that they *do not know that the cargo was wet by water which came upon it in consequence of the stranding*, they professing to follow the rule that all damage must be made particular average, *which cannot be distinctly traced to a general average cause*. We do not dispute the correctness of this rule, but it must be consistently applied; and on this rule the adjusters had no right to charge any portion of the damage which arose from springing, straining or opening of the seams, to general average. There was one cause, proved to be in operation, capable of producing these results, namely, the swelling of the cargo, and until it is proved by independent evidence that they were produced by some other cause, the damage thus occasioned must be carried to the account of particular average.

4. The cargo was mainly flaxseed. It was proved that the effect of water upon this article was to swell it (fol. 33). The ship, upon examination, was found to have been subjected to a tremendous vertical strain, pressing her decks and beams upwards with such force as to break the iron straps securing the beams to the stanchions. This must have been the effect of the swelling of the seed. (See Survey, p. 12.) It is impossible to read the survey and not see that this was the principal source

of damage to the ship, and it was a *proved* cause. We should naturally expect to see the principal part of the damage attributed to it in the adjustment.

5. On consulting the adjustment we find that the amount of damage attributed to this *proved* cause is quite inconsiderable. The whole expense of the repairs to the ship may be arranged as follows:

W. A. Freeborn & Co.'s bill (Sheathing, p. 28), ...	$4,298 18
F. H. James & Co.'s bill (Labor in metal, p. 29), ...	116 11
N. Y. Dry Dock Co.'s bill (Docking, p. 29), ...	1,084 75
George Brown's bill (Wharfage, p. 31), ...	115 17
Conally & Bro.'s bill (Painting, p. 31), ...	500 00
Westervelt Ship Yard's bill (Repairs, pp. 31 to 34), ...	13,437 34
	$19,551 55

The above amount of $19,551.55 is carried to the account of general average, while only two sums, being $100 for painting and $2,140.57 for repairs, are made a particular average. And this latter sum of $2,140.57 includes also the whole expense of repairing the injuries caused by the ice! It thus appears that the damage attributed by the adjustment to the proved principal cause of the injuries was inconsiderable.

6. Now let the same rule be applied against the vessel which was against the cargo, namely,

that all damage must be deemed particular average which is not traced to a general average cause; and where is the *evidence to show* that *any portion* of the expenses which make up the sum of $19,551.55 was due to repairs for damage occasioned by the ship's lying on an *uneven* bottom? There is none whatever. And yet these expenses have been *passed to the account* of general average *on the assumption* that this was the cause of the damage.

Record, fol. 29.

7. It may be claimed that repairs made necessary by the ship lying on the bottom, without reference to whether it was *uneven* or not, should go to the account of general average. But this will not do. The pretence of an *uneven* bottom where the ship lay on the flats was the sole ground upon which it was claimed that the peril to the ship was *increased* by the voluntary act of the master, and was thus a necessary part of the foundation of the claim. It will not answer to make use of this for the purpose of establishing the claim to a general average, and then discard it in making up the adjustment. And the adjusters did not pretend to discard it. They stood upon it.

8. It may be said that *some* injuries must result to a ship from lying on the bottom, even if it be soft and even. There is no evidence that such must be the result; but allowing scope here for conjecture even, such injuries would be likely to affect only the *sheathing* and the *seams* and if we allow to the general average account the entire sheathing bills, and bills for docking (omitting the first three bills in the

of damage to the ship, and it was a *proved* cause. We should naturally expect to see the principal part of the damage attributed to it in the adjustment.

5. On consulting the adjustment we find that the amount of damage attributed to this *proved* cause is quite inconsiderable. The whole expense of the repairs to the ship may be arranged as follows:

W. A. Freeborn & Co.'s bill (Sheathing, p. 28), ...	$4,298 18
F. H. James & Co.'s bill (Labor in metal, p. 29), ...	116 11
N. Y. Dry Dock Co.'s bill (Docking, p. 29), ...	1,084 75
George Brown's bill (Wharfage, p. 31), ...	115 17
Conally & Bro.'s bill (Painting, p. 31), ...	500 00
Westervelt Ship Yard's bill (Repairs, pp. 31 to 34), ...	13,437 34
	$19,551 55

The above amount of $19,551.55 is carried to the account of general average, while only two sums, being $100 for painting and $2,140.57 for repairs, are made a particular average. And this latter sum of $2,140.57 includes also the whole expense of repairing the injuries caused by the ice! It thus appears that the damage attributed by the adjustment to the proved principal cause of the injuries was inconsiderable.

6. Now let the same rule be applied against the vessel which was against the cargo, namely,

that all damage must be deemed particular average which is not traced to a general average cause; and where is the *evidence to show* that *any portion* of the expenses which make up the sum of $19,551.55 was due to repairs for damage occasioned by the ship's lying on an *uneven* bottom? There is none whatever. And yet these expenses have been *passed to the account* of general average *on the assumption* that this was the cause of the damage.

Record, fol. 29.

7. It may be claimed that repairs made necessary by the ship lying on the bottom, without reference to whether it was *uneven* or not, should go to the account of general average. But this will not do. The pretence of an *uneven* bottom where the ship lay on the flats was the sole ground upon which it was claimed that the peril to the ship was *increased* by the voluntary act of the master, and was thus a necessary part of the foundation of the claim. It will not answer to make use of this for the purpose of establishing the claim to a general average, and then discard it in making up the adjustment. And the adjusters did not pretend to discard it. They stood upon it.

8. It may be said that *some* injuries must result to a ship from lying on the bottom, even if it be soft and even. There is no evidence that such must be the result; but allowing scope here for conjecture even, such injuries would be likely to affect only the *sheathing* and the *seams*, and if we allow to the general average account the entire sheathing bills, and bills for docking (being the first three bills in the

above statement), the amount would be only $5,499.04.

9. If we attempt to go any further, we can go, upon the evidence in this case, upon no other principle than this; that where there is any ground for a general average, *all* average is to be carried to that account which is not distinctly proved to have resulted from a *particular* average cause—a complete reversal of the rule of law.

XII. If the claim for a general average has any foundation, the damage to the cargo, or some part of such damage, must be contributed for.

1. As has been shown under the Ninth above Point, the only foundation for this claim for a general average, which has plausibility even, is to be found in the consideration whether there was not perhaps a chance of some value that the ship might have been saved *altogether* from sinking. We have shown that the question was not put upon that ground; but waiving this, for the sake of the argument, it must follow that the general average, if rested at all on that ground, should include all the damage to the cargo arising from the water which the ship took in after the resolution was formed to put her on the flats.

2. Nor would there be any serious difficulty in making the discrimination. When the master came to his determination to run the ship on the flats, there were only six feet of water

in her. After she had settled on the flats, there were from 22 to 26 feet of water in her. It is ascertainable how much and what of her cargo was above, and how much and what was below the water in her when she left the spot where she was anchored.

XIII. The freight should be made to contribute at its full value. The rule adopted by the adjusters of taking it at one-half its value, when the whole was earned and received, is too palpably unjust to be permitted to prevail, unless it has some better warrant than custom.

1. The foundation of the custom is, that questions as to the contributory value of freight usually relate to a time before the voyage was performed, and as in equity freight could be made to contribute only on its nett value, after deducting the expense of earning it, and as the wages and provisions of the crew and other expenses during the portion of the voyage unperformed, or the expense of forwarding by another vessel in case of transhipment, would have to be deducted in order to arrive at the nett value, convenience, and, in the majority of cases, justice, would be subserved by taking some fixed proportion of the gross freight as representing its nett value.

2. The custom alleged is well enough in the cases of voyages partly performed; but it is a fundamental rule touching customs that they must be *reasonable*. In cases like the pres-

ent there seems to be no good reason why the freight should not be made to contribute at its full value. Especially should it be the case when, as here, the entire expense of bringing the cargo to the place of discharge was carried into the general average account.

Broome's Maxims, 4th Ed., 883 *et seq.*

Lastly. The judgment of the Court below should be reversed and a *venire de novo* ordered.

JAMES C. CARTER,

Of Counsel for Plaintiffs in Error.

Evening Post Steam Presses, 41 Nassau Street, cor. Liberty, N. Y.

Supreme Court

OF THE UNITED STATES.

William Rathbone, William Rathbone, Jr., Samuel G. Rathbone, Thomas K. Twist, and William Liddderdale,
Def'ts in error.

ads.

Frederick R. Fowler, William C. Fowler, and Mahlon B. Crampton,
Plaintiffs in error.

Statement and Points of the Defendants in Error.

This cause comes up on a writ of error to the Circuit Court for the Southern District of New York.

The action was brought by the defendants in error as owners of the ship *Oneiza* against the plaintiffs in error, who were owners and consignees of a portion of the cargo of the ship, to recover an amount claimed to be due as a general average contribution for damages occasioned by voluntary stranding the ship.

The action was *assumpsit*, upon an instrument called in the case an "average bond," which was subscribed by all the owners, consignees, and others interested. (See *fols.* 18–22.) By this agreement the defendants below, therein named as F. R. and W. C. Fowler, and Crampton (*fol.* 21), agreed with Joseph R. Busk, agent of the plaintiffs below, that the loss and damage incurred as therein recited, if matters of general average, as the same should be made to appear to be due from the subscribers respectively should be paid, provided such losses and expenses should "be stated and apportioned by Henry W. Johnson and A. Foster Higgins, in accordance with the established usage and laws" of the State of New York in similar cases. (*Fol.* 20.)

The adjusters charged upon the defendants' cargo the sum of $11,380 78 as a general average contribution in favor of the ship (*fol.* 22), and for this amount, with interest from the date of the adjustment, the jury found a verdict for the plaintiffs below. (*Fols.* 52–3.)

The principal question involved was whether the case was one for a general average contribution. The evidence bearing upon this question was substantially undisputed, and established the following state of facts:

The *Oneiza* sailed from Calcutta for New York, in August, 1866, with a cargo of merchandize, and arrived off Sandy Hook on the 16th of January, 1867. She anchored inside the Hook the same night, and there she became so embedded in ice that she could not be moved until the afternoon of the 21st, when she was taken in tow and towed up inside of the Narrows, and there anchored. The pumps were attended to during the night, and no more water was found in her than usual, but at half past six the next morning, when preparing to proceed to the city, she was found to have 26 inches of water in her, and she appeared to be settling. In half an hour later the water had increased so that she had six feet of water in her well. In this condition, and finding that she could not be kept free by any means within reach of her officers and crew, and there being no other imme-

diate resources, the master, acting for the best interest of all concerned and to prevent the ship from sinking in deep water (about ten fathoms, *fol.* 39), determined to run her into shoal water, and she was accordingly taken in tow and towed about 300 yards upon the Staten Island flats, where she grounded at 8 o'clock, with ten feet of water in her.

Assistance was obtained as soon as possible, and at 3 o'clock a boat with a steam pump and other wrecking apparatus arrived, whereupon a diver was sent down, who discovered that the larboard bow port had been seriously cut by the ice and partly stove in, and that the ice had also cut a hole 6 or 7 inches square in the starboard bow. These holes were temporarily stopped, the steam pump put in operation, and before 9 o'clock of the same evening the water had all been pumped out, from which time the ship was kept entirely free from water.

Before she was stranded the ship lay in from 7 to 10 fathoms of water, and if she had sunk there she would have been totally submerged, but on the flats where she was stranded the water was much shoaler, so that she was not at any time under water, but lay so much out of water that portions of her cargo were delivered dry and in good order. Although the ship could have been raised if she had been sunk in such deep water, yet it would have cost $30,000, as against $12,000, the cost of raising her where she was stranded, (*fol.* 26,) and moreover the cargo would all have been wet and damaged, if not rendered wholly worthless.

After discharging portions of the cargo into lighters the ship was got off and taken to the city, where the residue of the cargo was discharged.

No water entered the ship which caused any damage to the cargo, except what entered through the injuries in the bows above stated; nor were those increased, nor was the influx of water greater by or in consequence of such stranding.

The average statement was made up on the theory of a voluntary stranding, and the charges in general average

consisted of the salvage expenses and such portion of the damage to the ship as was attributable to her lying on the bottom. The damage caused to the vessel by the ice, and by the swelling of the cargo was not included. On the other hand, it was assumed in the adjustment that all the damages to the cargo was caused by water, and was owing to the condition of the vessel before the stranding. (*Fol.* 23.)

All parties in interest, except the defendants, paid according to the statement of the adjusters. (*Fol.* 23.)

At the close of the testimony, the several questions involved were submitted to the jury, and the requests and exceptions of the plaintiffs in error, and the instructions of the Court are at *fols.* 44–53.

POINTS.

I.—The question whether the facts showed a case of voluntary standing which entitled the vessel to claim contribution for the damages thereby caused is presented by the charge of the Court below, at fol. 50, that if the jury should find "that the ship and cargo were exposed to a common peril of sinking, and becoming submerged in deep water; and that the expenses of raising and saving them from such place would have been greater than if stranded in shoal water; and that the master, to save the ship and cargo from such increased expenses, ran the ship on the flats, and so stranded her in shoal water, and thereby increased the peril to the ship and diminished the damages and expenses of saving the ship and cargo," then there was a voluntary standing which entitled the ship to recover in general average.

This instruction was in accordance with the law as well settled in the Federal Courts.

(*The Col. Ins. Co.* v. *Ashby*, 13 *Peters*, 331; *Barnard* v. *Adams*, 10 *How.*, 270; *The Star of Hope*, 9 *Wall*, [illegible]; *Patten* v. *Darling*, 1 *Cliff.*, 254; *Rea* v. *Cutler*, 1 *Sprague*, 135; *Sturges* v. *Cary*, 2 *Curtis C. C. Rep.*, 59; *Caze* v. *Reilly*, 3 *Wash. C. C. Rep.*, 298: *Sims* v. *Gurney*, 2 *Binn.*, 513.)

203

4

The requests on the part of the defendants below which the Court refused, embraced the following propositions:

(1.) That the sinking of the ship where she was, being *inevitable*, therefore the towing or running of her upon the bottom in shallow water was a forced, not a voluntary stranding. (*Fol.* 44.)

(2.) That the risk to which she was exposed by the act of the master was similar in character to that which was already impending, and that there was therefore, no sacrifice. (*Fol.* 45.)

(3.) That at the time of the master's determination to run her ashore she was so exposed to the risk of lying on her bottom that she could not by any possibility be saved from such injuries and that therefore the stranding by act of the master was not an escape from the impending danger, in other words, was not successful. (*Fol.* 46.)

These propositions are first presented in the three requests for peremptory instructions to the jury, (*fols.* 44–46,) and then, in the three following requests for instructions as to the law, in case the jury should find the facts on which they were based. (*Fols.* 47–8.)

consisted of the salvage expenses and such portion of the damage to the ship as was attributable to her lying on the bottom. The damage caused to the vessel by the ice, and by the swelling of the cargo was not included. On the other hand, it was assumed in the adjustment that all the damages to the cargo was caused by water, and was owing to the condition of the vessel before the stranding. (*Fol.* 23.)

All parties in interest, except the defendants, paid according to the statement of the adjusters. (*Fol.* 23.)

At the close of the testimony, the several questions involved were submitted to the jury, and the requests and exceptions of the plaintiffs in error, and the instructions of the Court are at *fols.* 44–53.

POINTS.

I.—The question whether the facts showed a case of voluntary standing which entitled the vessel to claim contribution for the damages thereby caused is presented by the charge of the Court below, at fol. 50, that if the jury should find "that the ship and cargo were exposed to a common peril of sinking, and becoming submerged in deep water; and that the expenses of raising and saving them from such place would have been greater than if stranded in shoal water; and that the master, to save the ship and cargo from such increased expenses, ran the ship on the flats, and so stranded her in shoal water, and thereby increased the peril to the ship and diminished the damages and expenses of saving the ship and cargo," then there was a voluntary standing which entitled the ship to recover in general average.

This instruction was in accordance with the law as well settled in the Federal Courts.

(*The Col. Ins. Co.* v. *Ashby*, 13 *Peters*, 331; *Barnard* v. *Adams*, 10 *How.*, 270; *The Star of Hope*, 9 *Wall*, [redacted]; *Patten* v. *Darling*, 1 *Cliff.*, 254; *Rea* v. *Cutler*, 1 *Sprague*, 135; *Sturges* v. *Cary*, 2 *Curtis C. C. Rep.*, 59; *Caze* v. *Reilly*, 3 *Wash. C. C. Rep.*, 298: *Sims* v. *Gurney*, [redacted] *Binn.*, 513.)

203

4

The requests on the part of the defendants below which the Court refused, embraced the following propositions:

(1.) That the sinking of the ship where she was, being *inevitable*, therefore the towing or running of her upon the bottom in shallow water was a forced, not a voluntary stranding. (*Fol.* 44.)

(2.) That the risk to which she was exposed by the act of the master was similar in character to that which was already impending, and that there was therefore, no sacrifice. (*Fol.* 45.)

(3.) That at the time of the master's determination to run her ashore she was so exposed to the risk of lying on her bottom that she could not by any possibility be saved from such injuries and that therefore the stranding by act of the master was not an escape from the impending danger, in other words, was not successful. (*Fol.* 46.)

These propositions are first presented in the three requests for peremptory instructions to the jury, (*fols.* 44–46,) and then, in the three following requests for instructions as to the law, in case the jury should find the facts on which they were based. (*Fols.* 47–8.)

If these propositions were now presented for the first time in this Court, they would require discussion; but they have been repeatedly considered and disposed of in the cases above cited.

(1.) It is sufficient to make the act of sacrifice voluntary, that it is adopted as a matter of judgment, that upon deliberation the will decides. It is none the less voluntary, that no other way of escape seems open. This is held in all the cases.

(2.) The idea of *sacrifice* in the law of general average is not that the property shall be doomed to certain loss. The goods thrown overboard may have a fair chance of being recovered, or the vessel, which it is determined to run ashore, of being saved. It is the selection of one particular interest, of either vessel or cargo, to take a special, though it may be no greater, or even a less, risk for the benefit of the whole, that makes the special loss or damage consequent upon the act vicarious.

It is true, in this case, that but for the stranding the vessel would have gone down with the cargo. It is true, that by stranding her the master may possibly have not subjected the vessel to any greater peril than she was in before, but the fact that he changed the peril from one to ship and cargo in common, to a peril to the ship alone, constituted a sacrifice in the legal sense. If any damage was in fact caused to the vessel by stranding, it is no answer to her claim for contribution to say that she would have been equally damaged by sinking.

(3.) That the act of stranding was a benefit to

the cargo is undisputed, and that it was also a benefit to the ship, only makes her claim less in amount than it would have been had she been lost by the act of stranding. She could only claim and has only been allowed the damages caused specially by the stranding which was the voluntary and vicarious act, which saved the cargo from a heavier damage and expense.

II.—Most of the other exceptions of the plaintiffs in error relate to the sufficiency of the evidence, and are not available on writ of error.

The *seventh* request (*fol.* 48,) for an instruction that there was no evidence sufficient that the ship when stranded lay on an uneven bottom, &c., the *eighth*, that there was no evidence from which the jury conld determine what particular repairs were rendered necessary by the ship lying on the bottom, and what by the swelling of the cargo (*fol.* 49,) were of this character.

The rule on this subject is, that if there is evidence proper to be submitted to the jury it should be submitted. It is not necessary that it should be conclusive, and if the jury give too much weight to it the only remedy is by motion for a new trial, which is addressed to the discretion of the Court, and is not reviewable by writ of error.

Schuchardt vs. *Allen*, 1 *Wall.*, 359, 371.

(1.) The evidence showed that a careful discrimination by experts was made between the repairs. "We could not tell absolutely what damage was caused by lying on the bottom, and what from swelling of cargo, but we decided it as well as we could," and the same witness described particularly the damages (*fol.* 29). See also the Survey, *fol.* 31.

All this of course was not conclusive evidence, and might perhaps have been shown to be very weak had the defendants below called any witnesses to disparage it, but as they failed to do so the Court properly left it to the jury for their estimate.

(2.) Whether the ship lay on an uneven bottom or not was a question auxiliary merely to the determination of the question, whether certain damages were caused to the hull of the ship by the stranding. The testimony showed that where she lay the water was 22 feet at her bow and 26 at her stern (*fol.* 24), and Westervelt, the shipbuilder who did the repairs, finding the "fastenings about the keel and keelson" broken, and the vessel strained, attributed this, as an expert, to the vessel lying on an uneven bottom; and so did Story, the marine surveyor (*fols.* 28–30).

No objection was made to the giving of this evidence, and being in the case it was properly submitted to the jury.

(3.) It was not necessary, as already shown, that the place selected to ground the vessel should be, in order to make a case for general average, as claimed in the *seventh* request, either better or worse for the vessel—all that was necessary was that the place so selected, though it exposed the vessel to some hazard, should be chosen as being preferable to the perils impending where the vessel was.

III.—There was no ground for asking to have the damages caused to the ship by the swelling of the cargo, and by straining, equally divided (*fol.* 49). There

is no law for such a division, and no evidence was given to show its propriety.

IV.—The charge that if the jury found from the evidence that no water entered the ship which reached and damaged the cargo, except what came through the holes made by the ice, that the cargo would not be entitled to any contribution for its damage, was manifestly correct.

It was a question of fact simply how the damage to the cargo was caused. It seemed quite clear, from the evidence, that no water came to it except through the holes made by the ice before the stranding, and the defendants below cannot complain that the jury were left at liberty to find that some damage was done otherwise.

The exception to this portion of the charge (*fol* 51) is untenable.

V.—The jury, under the instructions of the Court (*fol.* 52), found that the adjustment was made up according to "the usage and custom of the Port of New York," which was proved to be to estimate for net freight one half the gross amount. (*Fols.* 22–3.)

The contract of the defendants below was to pay, if the adjustment should be made in accordance with such usage. (*Fol.* 20.) No evidence was given contradicting that of the plaintiffs below as to the usage. The charge was, therefore, correct, and the *ninth* request (*fol.* 49) properly refused.

The general rule is, it is true, that it is the *net* freight which contributes. But how to ascertain the net freight is sometimes a difficult question, and

the rule of taking one half the gross freight is not only customary in New York, and was, therefore, made the rule by the contract sued upon, but the rule has also been sanctioned by the Courts so as to have become a rule of law in that State. *Leavenworth* vs. *Delafield*, 1 *Caines' R.*, 573, 581. Says Parsons' (1 *Mar. Law*, 329): "The difficulty comes when we have to determine what is this net freight. It is usually reached by deducting a certain proportion from the gross freight, as one-fourth, or one-third, or one-half; most frequently one-third. Practically, the question seldom causes any embarrassment, because in most commercial ports some rule prevails which is sanctioned by general usage there, and an adjustment made at a proper place, according to the law of that place, is binding upon all parties and interests."

VI.—It is respectfully submitted that there is no error in the proceedings brought up by the writ of error, and that the judgment below should be affirmed.

E. H. Owen,
S. P. Nash,
Counsel for Defts. in Error.

OPINION.

UNITED STATES CIRCUIT COURT—
SOUTHERN DISTRICT.

WILLIAM RATHBONE et al.,
vs.
FREDERICK R. FOWLER et al,

BLATCHFORD, J.:

This is an action of assumpsit, brought by the owners of the ship *Oneiza*, to recover from the defendants, as consignees and owners of cargo transported on board of that vessel on a voyage made by her from Calcutta to New York, a sum alleged to be due to the plaintiffs by way of a general average contribution for losses and expenses suffered and incurred in consequence of an alleged voluntary stranding of the ship. It was tried before Mr. Justice Nelson and a jury on the 4th of June, 1868, and a verdict was taken by consent for the plaintiffs for $12,077. 73, subject to the opinion of the Court on a case to be made, and a readjustment, if necessary, to be ordered by the Court, with liberty for either party to turn the case into a bill of exceptions. The ship arrived off Sandy Hook on the 16th of January, 1867, and anchored on that night inside of the Hook. There was so much ice in the bay that she could not proceed until the 21st, when she was towed up, in the afternoon, as far as the Quarantine ground and anchored there. The water was full of floating ice. The next morning it was discovered that the ship was settling by the head, and by 7 o'clock A. M. she had six feet of water in her.

The leak was caused by holes broken in both of her bows by the ice. Ineffectual attempts were made to free her from water by her pumps, and the water being about forty-two feet deep where she was anchored, her master caused her to be towed a distance of 300 yards into shoaler water, on the Staten Island flats, until she grounded on the bottom at about 8 o'clock A. M. At the time she grounded she had ten feet of water in her. If she had sunk where she was anchored, she would have been totally submerged. A wrecking vessel, with divers and assistance, reached her about noon. The tide was then about an hour ebb, and the water was about the same height inside of her and outside. A diver was sent down and the holes were stopped. A pump was then started about 3 or 4 o'clock P. M. The water had reached to within two feet of her upper deck. Some of her cargo was not wet. The cargo consisted of gunny cloth, linseed in bags, jute, saltpetre, gunny bags and matting. She was pumped out by about 8 or 9 o'clock P. M., and after that she was kept free of water, and no more water reached her cargo. About half of her cargo was discharged into lighters, and she was then taken to the city and the rest was discharged. The ship could have been raised if she had sunk where she was anchored. The question of saving the vessel and cargo at either place was only a question of the expense of raising them. The wrecking bill was over $12,000 and would have been $30,000, if she had sunk where she was anchored. The defendants, on the 23d of January, 1867, signed an agreement, commonly called an average bond, whereby they agreed to pay as consignees of cargo, what should be found to be due from them, on their share of the cargo, for general average losses and expenses arising out of the transaction, provided such losses and expenses should be stated and apportioned by Johnson & Higgins, average adjusters, in accordance with the established usage and laws of the State of New York in similar cases. Such an adjustment was made by Johnson & Higgins, according to the usage and customs of the port of New York, and they ascertained the balance due from

the defendants to be $11,380.78, July 20th, 1867. The adjusters made no allowance to the defendants for the damage sustained by their cargo from the water which entered the ship, on the ground that such damage was caused by water which entered through the holes made in the bows of the vessel by the ice, and therefore, by a peril of the sea, and was not caused by the stranding and was not a general average loss, toward which the ship and her freight should contribute. The effect of the water upon the linseed in bags was to swell it very much, and strain the ship considerably. The swelling of the linseed and the lying on an uneven bottom at the place of stranding, together, started up the deck and strained and broke the beams and the straps over the beams.

The adjusters did not allow as a general average loss anything for any damage sustained by the ship from the swelling of the linseed, on the ground that such swelling was caused by water which entered through the holes in the bows from a peril of the sea, and, therefore, was not caused by the stranding; but they did allow, as a general average loss, the damage caused to the ship by lying on an uneven bottom when stranded. The salvage expenses were put into general average. According to custom, one-half of the gross freight for the whole voyage was taken as the net freight to be contributed for.

1. The first question which arises is, whether there was a voluntary stranding of the ship in such a sense as to authorize a general average among ship, freight, and cargo, of the loss and damage caused by the stranding. The defendants contend that there was no voluntary stranding. The only damage to the ship, which it is claimed by the plaintiffs should be contributed for in this case in general average, is the damage caused by lying on the uneven bottom when stranded. That damage was manifestly caused by the stranding, and by nothing else. There was a peril common to both vessel and

cargo where the vessel was anchored, at the time the Master determined to strand her. That common peril was the danger of their going down together in deep water, where they would be entirely submerged, and where the cargo would have remained much longer under water, and been much more injured, and where the expense of raising them would have been much greater. This common peril was imminent, and apparently inevitable, unless the ship should voluntarily incur the damage which has happened to her from lying on the uneven bottom on the flats in shallower water, for the purpose of puting the bulk of the cargo in a position where it would not be required to remain so long under water as if it had sunk in the deeper water, and for the purpose of preventing a part of it, as it turned out, from being at all wet. The injury to the ship, by her lying on the uneven bottom on the flats where she was stranded, was a voluntary *jactus* of the ship in that regard, to avoid the peril above named, and was a transfer of such peril in that regard from vessel and cargo to vessel alone. The attempt to avoid the peril was successful. All the elements exist in the case which make up a voluntary stranding, as settled by the Supreme Court, (Barnard *v.* Adams, 10 Howard, 270, 303). The cargo was rescued, by the stranding, from the peril of the deep water, and the vessel was injured by such stranding. The vessel suffered to benefit the cargo. The case is, in my judgment, a very plain one for a general average contribution.

2. The adjusters did not make any improper allowance to the ship. They only allowed for the damage caused to her by lying on the uneven bottom. They did not allow for any damage caused to her by the swelling of the linseed. The water which swelled the linseed came through the holes made by the ice, which was a peril of the sea.

3. The adjusters were correct in not allowing, in general average, for any damage done to the cargo by

water which came through the holes made by the ice. The evidence shows that all the damage done by water to the cargo was done by water which came through those holes. The fact that the water entered through the holes after the determination was made to strand the vessel, has nothing to do with the question.

4. In view of the terms of the average bond, and of the usage of the port of New York, in like cases, as proved, I think the adjusters acted properly in taking as the contributory value of the freight, one-half of the gross freight agreed to be paid for the voyage on which the disaster occurred. The principles on which the adjusters proceeded having been correct, I think the evidence fully warrants the results they arrived at. There must be a judgment on the verdict for the plaintiffs.

EDWARD H. OWEN,
For the plaintiffs;
JAMES C. CARTER and
TOWNSEND SCUDDER,
For the defendants.